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No. 80-1857

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

Citizens Concerned for Separation of Church and State,

Petitioner,

v.

City and County of Denver,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

Defendant, who consented to consolidation of the hearing on the merits with the hearing on preliminary injunction pursuant to Rule 65(a)(2), Fed. R. Civ. P., neither filed an answer denying plaintiff's properly pleaded standing allegations nor contested plaintiff's standing at trial. On appeal of a final judgment for plaintiff, when standing was first challenged, the court of appeals held that absence of proof of the standing allegations deprived the district court of jurisdiction. Subsequently, after remand, the court of appeals prohibited the district court from holding a hearing to permit plaintiffs to prove the standing allegations. The questions these facts raise are as follows:

1. Whether, under Rule 8(d), Fed. R. Civ. P., defendant's consent to consolidation under Rule 65(a)(2) and failure to serve an answer specifically required by Rule 7 constituted an admission of all allegations in the complaint not specifically put in issue at the hearing?

2. Whether the court of appeals erred by forbidding the district court from holding a hearing to permit plaintiff to establish standing after defendant had challenged it for the first time in the court of appeals?

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Opinions Below

There were two opinions below by the Court of Appeals for the Tenth Circuit. The first, issued September 4, 1980, remanding the cause to the district court with instructions to vacate its judgment for want of jurisdiction due to plaintiff's failure to prove its standing, is reported sub nom. Citizens Concerned for Separation of Church and State v. City and County of Denver at 628 F.2d 1289 (10th Cir. 1980) (Appendix A, infra). The second, issued December 3, 1980, prohibiting the district court from holding a jurisdictional hearing at which plaintiff sought to establish that it had always had standing, is reported sub nom. City and County of Denver v. Matsch at 635 F.2d 804 (10th Cir. 1980)(Appendix B, infra). A

petition for rehearing and suggestion for rehearing en banc was denied on January 8, 1981, and is not reported (Appendix C, infra). The decision of the district court is reported sub nom. Citizens Concerned for Separation of Church and State v. City and County of Denver at 481 F.Supp. 522 (D. Colo. 1979) (Appendix D, infra).

Jurisdiction

The judgment of the Court of Appeals for the Tenth Circuit, interpreting its earlier decision of September 4, 1980, was entered on December 3, 1980. A timely motion for rehearing and suggestion for rehearing en banc were denied on January 8, 1981; and this petition for writ of certiorari was filed within 90 days of

that date.[1] Jurisdiction over this case is conferred by 28 U.S.C. §1254(1) (1970).

Statutes and Rules At Issue

1. Rule 7, Federal Rules of Civil Procedure

(a) Pleadings. There shall be a complaint and an answer; a reply to a coun-

1. Although more than ninety days has elapsed since the court's first judgment of September 4, 1980, it was not until the court's second judgment of December 3, 1980, interpreting its prior mandate, that the full import of the prior judgment could have been appreciated. It is not until the latter judgment, giving content to the first, that the time for submitting this petition began to run. Federal Trade Commission v. Colgate-Palmolive Co., 380 U.S. 374, 378-84 (1965); United States v. Adams, 383 U.S. 39, 41-42 (1966).

terclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is servied. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.

2. Rule 8, Federal Rules of Civil Procedure

(d) Effect of Failure to Deny. Averments in a pleading to which a responsive pleading is required, other than those as

to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

3. United States Code, Title 28:

§1653. Amendment of pleadings to show jurisdiction.

Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts.

4. Rule 15, Federal Rules of Civil Procedure

(a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served . . . .

Statement Of The Case

On November, 28, 1979, petitioner (hereinafter sometimes referred to as plaintiff) filed its complaint in the District Court for the District of Colorado pursuant to 42 U.S.C. §1983 (1970), seeking a preliminary and permanent injunction against the respondent herein, the City and County of Denver (hereinafter sometimes referred to as defendant or the City), from including a nativity scene or creche as part of its annual Christmas lighting display on and about the City and County Building, the central government office building of the City and County of Denver, Colorado. Jurisdiction in the district court was based on 28 U.S.C. §1343(3)(1970).

A hearing on the motion for a preliminary injunction was held on December 12, 1979. At that time no answer had been filed, nor was it yet due. At the conclusion of the hearing both parties stipulated that the hearing on the preliminary injunction would constitute the full trial on the merits. The district court's colloquoy with counsel regarding this stipulation is quoted by the court of appeals in its opinion of September 4, 1980. Appendix A, at 53-55.

On December 17, 1979, the Honorable Richard Matsch of the United States District Court for the District of Colorado announced in court the decision to grant a permanent injunction against the City from including a nativity scene as part of the Christmas holiday display

and ordered that the scene, which had been erected after the action was filed, be dismantled within forty-eight hours from the entry of the order. Judge Matsch's Memorandum Opinion and Order are reported at 481 F.Supp. 522. At no time during the hearing on the motion for a preliminary injunction, nor at the hearing at which the court announced its decision, or at any other time before the district court did defendant question plaintiff's standing to bring the action.

On the following day, December 18, 1979, the City filed a notice of appeal with the Tenth Circuit and sought a stay of the district court's mandate. On the same day, minutes before a memorandum of law opposing the stay was filed, the Tenth Circuit granted the stay on the grounds

that "the public interest is best served by the grant of the stay and the determination of the issues after full consideration by the Court of Appeals." A motion for rehearing on the issue of the stay and a suggestion for hearing en banc were denied by the Tenth Circuit.

Petitioner then filed an Application For Vacation of Stay Issued By the United States Court of Appeals for the Tenth Circuit, addressed to the Honorable Byron White. Justice White referred the Application to the full Court, which denied it on January 21, 1980. Justices Brennan and Marshall dissented from the Court's denial of the application to vacate the stay. 444 U.S. 1041 (1980) (erroneously omitting reference to Justice Brennan's dissent).

On September 4, 1980, the Court of Appeals for the Tenth Circuit, in a decision by Judge Barrett, reversed the decision of the district court, holding that plaintiffs failure at the hearing on the motion for a preliminary injunction to introduce proof of its allegations of taxpayer standing deprived the district court of jurisdiction. The cause was remanded to the district court with instruction to vacate its judgment of December 17, 1979, for want of jurisdiction. 628 F.2d 1289 (10th Cir. 1980).

Following the decision of the Tenth Circuit, plaintiff returned to the district court and moved the court to hold a hearing at which its standing could be established. A hearing on this motion was held on October 14, 1980, at which time

plaintiff made a proffer of proof sufficient to meet the requirements of standing set forth in the decision of the court of appeals. In a decision titled Memorandum Opinion And Order Interpreting Mandate, Vacating Judgment And Directing Evidentiary Hearing On Jurisdiction, dated October 14, 1980, Judge Matsch granted plaintiff's motion for an evidentiary hearing on standing, setting the hearing for October 24, 1980. Judge Matsch's decision is reproduced in the Appendix, E.

In response to Judge Matsch's ruling, defendant filed a petition for writ of prohibition with the court of appeals on or about October 16, 1980, in which it sought an order from the Tenth Circuit prohibiting the district court from holding the jurisdictional hearing on the

grounds that to do so was contrary to the mandate of the court of appeals in its decision of September 4, 1980. In an order dated October 22, 1980, the court stayed the district court from holding the hearing of October 24, 1980, and directed that the parties file simultaneous briefs by November 3, 1980, "directed to the issue of the power and authority of the District Court to entertain the jurisdictional hearing in light of the prior opinion of this Court" on September 4, 1980, or "whether the judgment of the District Court vacated by this Court for want of jurisdiction was rendered void thereby."

Notwithstanding the fact that the briefs were before the court of appeals by November 3, and counsel for plaintiff sent a letter to the court in mid-November

pointing out that construction of the 1980-81 holiday display was imminent, no decision was forthcoming. On December 2, 1980, having heard nothing and to protect its rights, plaintiff filed a second action, identical to the first, seeking a preliminary and permanent injunction against the City's inclusion of a nativity scene as part of the holiday display.[2]

The day after the second suit was filed the court of appeals granted defendant's petition for writ of prohibition, holding that it was its clear intent in

2. The second case, Citizens Concerned for Separation of Church and State v. City and County of Denver (hereinafter referred to as Citizens II), filed December 2, was, on December 17, finally assigned to Judge David K. Winder, of the

(footnote 2 continued)

District of Utah, after all seven judges to whom the case was presented in the District of Colorado either recused themselves or declined to hear it. Judge Winder declined to rule on plaintiff's motion for a temporary restraining order, preferring to rule after a hearing on the motion for a preliminary injunction. That hearing was held on January 12 and 13, 1981. The display was lighted from December 17, 1980, through January 2, 1981, kept in place but unlighted until January 14, 1981, when it was relighted for the ten days of the National Western Stock Show, until January 24, 1981. In a decision dated February 20, 1981, plaintiff's motion for a preliminary injunction in Citizens II was denied. Judge Winder's opinion is included in the

its decision of September 4, 1980, "to dismiss the underlying complaint and action for failure to comply with fundamental jurisdictional prerequisites." Appendix B, at 127. Again, the opinion for the court was written by Judge Barrett; Judge McKay merely concurred in the result and Judge Doyle, in a brief opinion, dissented.

On December 8, 1980, before seeking a rehearing in the court of appeals, plaintiff mailed to this Court an emergency Application For Vacation Of Order To Cease And Desist Issued By The United States Court Of Appeals For The Tenth Circuit,

(footnote 2 continued)

Appendix, F, for the convenience of the Court. A hearing on the permanent injunction has been set to commence on June 18, 1981.

addressed to the Honorable Byron White. Justice White referred the Application to the full Court, which denied it on December 15, 1980, Justices Brennan, White and Stevens dissenting from the denial. 101 S.Ct. 779 (1980). On December 17, 1980, plaintiff filed its motion for rehearing and suggestion for rehearing en banc with the court of appeals, which was denied on January 8, 1981.

Reasons For Allowance Of The Writ

1. BY HOLDING THAT A DEFENDANT WHO AGREES TO A CONSOLIDATION OF THE HEARING ON A MOTION FOR PRELIMINARY INJUNCTION WITH THE FULL TRIAL ON THE MERITS AND WHO NEVER FILES A RESPONSIVE PLEADING HAS NOT ADMITTED ALL ALLEGATIONS IN

THE COMPLAINT NOT PUT AT ISSUE DURING THE HEARING THE COURT OF APPEALS (1) HAS DECIDED A QUESTION OF FEDERAL CIVIL PROCEDURE THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT AND (2) HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR THIS COURT'S POWER OF SUPERVISION.

No one during this litigation has questioned the proposition that plaintiff need not prove facts alleged in the complaint as the basis for jurisdiction unless those allegations are put at issue by being denied in a responsive pleading. KVOS, Inc. v. Associated Press, 299 U.S.

269, 277-78 (1936); Stern v. Beer, 200 F.2d 794, 796 (6th Cir. 1952); see Biggs v. Public Service Coordinated Transport, 280 F.2d 311, 314 (3d Cir. 1960). The court below accepted the validity of that statement but held that, because at the time of the hearing on plaintiff's motion for a preliminary injunction the defendant's answer was not yet due, all allegations in the complaint were "taken as denied." Rule 8(d), Fed. R. Civ. P. In the court's words:

> Here, the answer of City was not due when the hearing on the injunctive relief sought by Citizens was held. No contention is made that City was required to file an answer or other pleading prior to the hearing. Thus, there

was no statutory failure on the part of City to plead. Nor could there be, inasmuch as no responsive pleading was required at the date of the hearing on the petition for grant of a preliminary injunction. The last sentence of rule 8(d), supra, explicitly provides:

"Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided." Thus, in our view, the burden of establishing all jurisdictional facts was squarely that of the petitioner, Citizens, when the District Court hearing was held. [Appendix A, at 91-92 (emphasis in original).]

The court below has seriously misconstrued Rule 8(d), and done so in a way directly contrary to the direction in Rule 1 that the Rules be construed "to secure the just, speedy, and inexpensive determination of every action." Contrary to the court's holding, the word "required" in Rule 8(d), "pleading to which no responsive pleading is required" (emphasis added), is not synonymous with the words "yet due." The reference is to the nature of the pleadings themselves. Thus, "Pleadings beyond the reply are not permitted." 5 Wright and Miller, Federal Practice And Procedure: Civil §1189, at 28 (1969); see id. §1279, at 355; 2A Moore's Federal Practice ¶8.29 (2d ed. 1980). A responsive pleading to a complaint is required. "There shall be a complaint and

an answer . . . ." Rule 7(a), Fed. R. Civ. P. (emphasis added).

Even if an answer was not yet due at the time of the hearing on the motion for a preliminary injunction, it was clearly required to be filed thereafter.[3] By stipulating to a consolidation of the hearing on the motion for a preliminary injunction with the full trial on the merits without having yet filed an answer, defendant failed to meet the demands of Rule 7(a), with the consequence under Rule 8(d) that all allegations in the complaint not actually put at issue at the hearing,

3. In Citizens II this is, in fact, what defendant did. As in Citizens I, the hearing on plaintiff's motion for a preliminary injunction was held before the answer was due; but, in contrast to

cf. Harvey Aluminum, Inc. v. American Cyanamid Co., 203 F.2d 105, 108 (2d Cir.), cert. denied, 345 U.S. 964 (1954), were deemed admitted, including the allegations of standing.

One of the purposes of a responsive pleading is to put a plaintiff on notice as to those allegations of fact in the complaint which are at issue and which, therefore, must be proved. Although defendant here failed to raise the standing issue during the trial because of

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(footnote 3 cont.)

Citizens I, in Citizens II defendant refused to stipulate that the hearing on the preliminary injunction would constitute the full trial on the merits and reserved the right to put on additional evidence at

inadvertence,[4] it is clear that the court's holding, below, would apply as well to one who held back intentionally, waiting to see the verdict and, then, if adverse, challenging it on appeal for lack of jurisdiction. The court's ruling would permit a defendant, aware that evidence supporting unchallenged allegations of standing had not been introduced, when such allegations could easily be proved if

(footnote 3 continued)

a hearing on the permanent injunction. Following the preliminary injunction hearing in Citizens II, defendant filed its answer, in which it denied plaintiff's allegations of standing.

4. At a hearing before Judge Matsch, on October 14, 1980, in response to a question by the court why the issue of standing had not been raised at the district court level, counsel for the City

put at issue, to do just as defendant did -- take a chance that the decision on the preliminary injunction would be favorable to defendant but retain the jurisdictional challenge on appeal if that prognosis should prove overly optomistic. An observation by the Seventh Circuit while considering a closely related issue is here particularly apposite:

> If a defendant may hold tight to a defective jurisdictional averment as an anchor to windward and then go through a trial on the merits, knowing that, if he wins on the merits, he can have the record cured so that his opponent

(footnote 4 cont.)

candidly replied that it was because no one had thought of it.

> is forever stopped, while, if beaten, he may sue out a writ of error and insist to the appellate tribunal that it is powerless to do other than grant him a new trial on the merits, skill in fencing by the advocates would seem to be more influential in reaching results than justice between the parties . . . . [Parker Washington Co. v. Cramer, 201 F.878, 880 (7th Cir. 1912).]

A construction of Rule 8(d), Fed. R. Civ. P., which would encourage such tactics is hardly compatible with the spirit and purpose of the Federal Rules of Civil Procedure and calls for this Court's power of supervision. Cf. Delta Airlines, Inc. v. August, 49 U.S.L.W. 4241 (March 9, 1981).

2. IN PROHIBITING THE DISTRICT COURT FROM HOLDING AN EVIDENTIARY HEARING TO DETERMINE JURISDICTION THE COURT OF APPEALS FOR THE TENTH CIRCUIT HAS SO FAR DEPARTED FROM AND IS IN CONFLICT WITH THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR THIS COURT'S POWER OF SUPERVISION.

Where the factual predicate for jurisdiction is questioned for the first time on appeal the proper procedure is to permit the plaintiff to return to the district court and, either by amendment to the complaint or by an evidentiary hearing limited to the jurisdictional question, to correct the defect in the record. Every court that has ever considered such an

issue has held that procedure to be appropriate, see, e.g., Familia De Boom v. Arosa Mercantil, S.A., 629 F.2d 1134, 1139, 1140 (5th Cir. 1980); Patrician Tower Owners, Inc. v. Fairchild, 513 F.2d 216, 222 (4th Cir. 1975); Mullins v. Beatrice Pocahontas Co., 489 F.2d 260 (4th Cir. 1974); Fifty Associates v. Prudential Ins. Co., 446 F.2d 1187, 1192-93 (9th Cir. 1970); Kern v. Standard Oil Co., 228 F.2d 699, 701 (8th Cir. 1956); Kaufman v. Western Union Telegraph Co., 224 F.2d 723, 725 (5th Cir. 1955); Finn v. American Fire & Casualty Co., 207 F.2d 113, 115 (5th Cir. 1953); Chicago, R. I. & P. Ry. Co. v. Stephens, 218 F. 535, 540-41 (6th Cir. 1914); Parker Washington Co. v. Cramer, 201 F.878 (7th Cir. 1912); Grand Trunk Western Ry. Co.

v. Reddick, 160 F.898, 901 (7th Cir. 1908); 6A Moore's Federal Practice ¶59.16, at 59-297 (2d ed. 1979). In the court below petitioner placed its chief reliance on one case decided by this Court, Sierra Club v. Morton, 405 U.S. 727 (1972), and three cases decided by the Tenth Circuit itself, Whitelock v. Leatherman, 460 F.2d 507, 515 (10th Cir. 1972); Buell v. Sears, Roebuck And Co., 321 F.2d 468, 471 (10th Cir. 1963); Coppedge v. Clinton, 72 F.2d 531, 536 (10th Cir. 1934).

In Sierra Club v. Morton, 405 U.S. 727 (1972), after finding that the Sierra Club had failed to allege in the pleadings or affidavits the personal stake in the controversy necessary to establish standing, this Court observed in a footnote:

> Our decision does not, of course, bar the Sierra Club from seeking in the District Court to amend its complaint by a motion under Rule 15, Federal Rules of Civil Procedure [405 U.S. at 736 n.8.]

Whitelock v. Leatherman, 460 F.2d 507 (10th Cir. 1972), and Buell v. Sears, Roebuck And Co., 321 F.2d 468 (10th Cir. 1963), were both cases in which jurisdiction was predicated on diversity of citizenship. In both cases defects in diversity pleading were noticed for the first time by the court, itself, on appeal. In both cases the court noted that there was a probability that proper diversity could be established and conditionally affirmed the judgments below on the merits, requiring plaintiff to amend

the complaint in both cases to properly plead diversity of citizenship.

Sierra Club, Whitelock, and Buell were accepted by the court below for the proposition that "litigants should be accorded liberal rights to amend the complaint or by other pleadings [sic] in order to cure the jurisdictional defects existing in the allegations." 635 F.2d at 807. But, the court went on to point out, those cases have no application to the case at bar. They were distinguished on the ground that in this case, unlike those, there was no defect in the pleadings. Jurisdiction here, unlike those cases, had been properly pleaded. In the case at bar, unlike those cases, the problem was in the absence of proof to support the proper pleadings.

The distinction suggested by the Tenth Circuit is not only patently untenable as a matter of logic, it is also perverse. A plaintiff who properly pleads jurisdiction but inadvertently neglects to prove it is entirely stripped of whatever he won below on the merits and must commence a completely new lawsuit. A plaintiff who fails either to plead or prove jurisdiction, on the other hand, is permitted to return to the trial court, plead jurisdiction, and, if necessary, prove it, Stern v. Beer, 200 F.2d 794 (6th Cir. 1952), and retain the fruits of his earlier victory.

In Coppedge v. Clinton, 72 F.2d 531 (10th Cir. 1934), plaintiff brought his action in federal court on the basis of diversity of citizenship. He alleged in the complaint that he was a citizen of

Arkansas and that the defendant was a citizen of Oklahoma. After a trial on the merits, in which plaintiff prevailed, defendant urged on appeal that the court below was without jurisdiction because requisite diversity of citizenship was lacking. Defendant urged that plaintiff, who had been adjudicated an incompetent while a citizen of Oklahoma, lacked the necessary mental capacity to establish citizenship in Arkansas. The court of appeals held that under these circumstances plaintiff had the burden of establishing his mental ability to adopt a new domicile, and that the record was entirely barren of any such evidence. In the absence of such evidence, the court held, the court below was without jurisdiction. The court went on to conclude, however,

that the jurisdictional defect did not require a retrial on the merits. Instead, it remanded for a jurisdictional hearing to determine the requisite mental capacity, with directions to the trial court, should the necessary mental capacity be established, to then re-enter its earlier decree.

The entire discussion of Coppedge by the court below is as follows:

> Coppedge v. Clinton, supra, does not support the District Court's order. The challenge there was lack of jurisdiction for want of requisite diversity of citizenship. This Court did, to be sure, remand for trial on the jurisdictional issue only. The remand in Coppedge, unlike the

> remand in the instant case, was predicated on the use of improper legal criteria applied by the trial court. Such was not the problem in the case at bar. Jurisdiction was simply not established, although properly plead. No mistake in application of legal doctrines or criteria led to the deficiency in this case, as in Coppedge. There is no similarity between the two cases. [635 F.2d at 807 (emphasis added).]

With all due respect to the Tenth Circuit, the similarity between the two cases is striking. In both, jurisdiction was properly pleaded and in both the court of appeals found that there was insuffi-

cient evidence in the record to support the allegations of the complaint. Further, both trial courts were apparently of the view that such evidence was not necessary, a view later held erroneous by the court of appeals in both cases.

The court below attempted to distinguish Coppedge on the grounds that improper legal criteria were used by the trial court in that case, but not in this case. First, there is nothing whatever in the record to support that conclusion. The trial judge may well have been of the view that, since the allegations of jurisdiction had not been denied, they need not be proved, a view later found erroneous by the Tenth Circuit in its decision of September 4, 1980. More importantly, however, what possible difference could

such a distinction make? The critical point is that, for whatever reasons, facts ultimately found necessary to establish jurisdiction, although pleaded, had not been proved.

The ruling below, precluding plaintiff from returning to the district court to prove standing, so far departs from and conflicts with the accepted and usual course of judicial proceedings to call for this Court's power of supervision.

Conclusion

Both parties have had the benefit of one full trial on the merits in this matter and in that trial plaintiff prevailed. Plaintiff is entitled to the judgment which it earned. The fact that a second ruling on a motion for a preliminary injunction is adverse to plain-

tiff and in direct conflict with the first judgment underscores rather than minimizes the need for the relief sought herein. The parties have had their day in court. That is all to which either of them is entitled. A hearing on plaintiff's prayer for a permanent injunction, scheduled to begin June 18, 1981, ought never to take place.

It is respectfully submitted that both decisions below were clearly erroneous and that the issues here presented are ideally suited for summary treatment rather than plenary review. It is respectfully requested that this Court grant the petition for writ of certiorari and summarily reverse the decisions below, either by finding that plaintiff need not have proved its allegations of standing because

they were never denied or, assuming arguendo that they needed to be proved, that plaintiff has the right to return to the district court to prove that that court always had jurisdiction and to have the prior judgment reissued.

Respectfully submitted,

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APPENDICES

APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

CITIZENS CONCERNED FOR SEPARATION OF CHURCH AND STATE,	)	
Plaintiff-Appellee,	)	No. 79-2303
v.	)	
THE CITY AND COUNTY OF DENVER,	)	
Defendant-Appellant.	)	

Appeal From the
United States District Court
For the District of Colorado
D.C. No. 79-M-1605

Jonathon B. Chase, American Civil Liberties Union Foundation of Colorado, Inc., Boulder, Colorado (Daniel H. Israel of Dechert, Price & Rhoads, Denver, Colorado, with him on the brief), for Plaintiff-Appellee.

Stan M. Sharoff, Assistant City Attorney, City of Denver, Colorado (Max P. Zall, City Attorney, Brian H. Goral and Stanley Ereckson, Jr., Assistant City Attorneys, City of Denver, Colorado, with him on the brief), for Defendant-Appellant.

Marc D. Stern, New York, New York, filed an amicus curiae brief for American Jewish Congress.

Mark M. Wolfe, Denver, Colorado, filed an amicus curiae brief for National Organization for Our American Heritage.

Before BARRETT, DOYLE and McKAY, Circuit Judges.

BARRETT, Circuit Judge.

The City and County of Denver (City) appeals from a judgment entered December 17, 1979, in favor of Citizens Concerned for Separation of Church and State (Citizens) enjoining the inclusion of the Nativity Scene in the Christmas display at the Denver City and County Building, ordering its removal within forty-eight hours, and awarding plaintiff costs and attorney's fees.

Litigative Background

This action was initiated by complaint filed November 28, 1979, by Citizens, brought by alleged but unnamed Denver residents charging violations of the Establishment Clause of the First and Fourteenth Amendments to the United States Constitution and Article Two, Section Four and Article Nine, Section Seven of the

Colorado Constitution. Citizens sought declaratory judgment and preliminary and permanent injunctive relief to prevent the City from "displaying, storing, and appropriating public funds for the nativity scene (creche) in front of and within the City and County Building. The creche is part of the City and County's Christmas Lighting Program which has been conducted annually for more than eight years, and includes a Santa Claus scene and lighting display." [R., Vol. I, p. 1].

The claim was brought pursuant to 42 U.S.C.A. § 1983. The District Court's jurisdiction was alleged to have vested pursuant to 28 U.S.C.A. § 1343(3).[1]

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[1] 28 U.S.C.A. § 1343(3) provides that the federal district courts shall

Under the caption "Parties", Citizens alleged:

PARTIES

Plaintiff, Citizens Concerned for Separation of Church and

(footnote 1 cont.)

have original jurisdiction of any civil action authorized by law to be commenced by any person ". . . [t]o redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

> State, is an unincorporated association, members of which are residents and taxpayers of the City and County of Denver and the State of Colorado. All have paid taxes which are used, in part, to erect, maintain, display, disassemble and store the creche. [R., Vol. I, p. 2].

The complaint was executed by Jonathon Chase, attorney for plaintiff, FOR: American Civil Liberties Union Foundation of Colorado. [R., Vol. I, p. 4].

Citizens moved for entry of a preliminary injunction on December 6, 1979, pursuant to Fed. Rules Civ. Proc. rule 65(a), 28 U.S.C.A. The matter was thereafter heard on December 12, 1979, prior to the filing of any answer or other

response by City. The parties presented witnesses and exhibits. At the conclusion of the evidence and arguments of counsel, the following colloquy occurred, after the presiding judge inquired of counsel for Citizens of the remedy desired and was informed that the requested remedy was the entire removal of the Nativity Scene from the Christmas display:

THE COURT: . . . If this case were to be decided with an additional opportunity for hearing or trial would the City put on anything different from what you have already put on?

MR. ERECKSON: We don't believe so, Your Honor.

THE COURT: Essentially, you have presented your case?

MR. ERECKSON: Essentially we have, Your Honor.

THE COURT: You don't feel disadvantaged in your case by doing this in a rush for Motion for Preliminary Injunction?

MR. ERECKSON: I don't believe so, Your Honor.

THE COURT: Well, I guess I can't duck out. I don't have any procedural ground, but I do believe that if I took until Monday to decide the case I wouldn't be guilty of permitting an irrevocable injury to occur between now and then, at least whether I do or don't. I am at least going to take that long to think about it.

So what I will do--take the case under advisement, and we'll resume at two o'clock on Monday. I guess that is the 17th, isn't it?

MR. ERECKSON: It is, Your Honor.

THE COURT: At which time I will rule.

MR. CHASE: Your Honor, in light of the defendant's position with respect to whether or not they would wish to put on more, I would move at this time that Rule 65(a)2, that this hearing be consolidated and be considered the trial on the merits.

THE COURT: Is that stipulated and agreed?

MR. ERECKSON: So stipulated.

THE COURT: All right, your motion is granted, and by stipulation it is granted, and the case is now standing submitted on the merits, and I'll have my ruling at two o'clock, Monday afternoon and announce it from the bench.

[R., Vol. II, pp. 155-157].

On December 17, 1979, the Court announced its ruling from the bench. The Court, both orally, and thereafter in its

memorandum opinion and order filed that same day, observed that the civil action was brought "by an unicorporated association of residents and taxpayers of the City and County of Denver, Colorado, appearing through the American Civil Liberties Union". [R., Vol. III, pp. 2, 3; Vol. I, p. 14]. The Court reviewed thehistory of the lighting display at the City and County Building in downtown Denver, maintained for many years during the annual Christmas holiday season, and found: that it involves a spectacle of lights, stars, candles, Christmas cards, an elves' toy shop, Santa Claus, reindeer, flood lights, various tinsel, a cross, and the challenged creche or Nativity Scene; the creche, since the year 1962, has been owned and maintained by City; the creche consists of life-size figurines of Mary,

Joseph, the infant Jesus, shepherds, wise men, and domesticated animals, depicting the birth of Christ as described in the writings of St. Matthew, St. John, and St. Luke; the figurines used in the Nativity Scene were purchased by Denver with public funds in 1962; the evidence presented at trial was overwhelmingly supportive of plaintiffs' position that the Nativity Scene is a religious symbol and that by including it in the Christmas display the City and County of Denver violated the Establishment Clause of the First Amendment which is incorporated in the Fourteenth Amendment to the United States Constitution. [R., Vol. I, pp. 14-17]. The Court concluded that even though the designed total effect of the display is to turn the entire front of the City and

County Building into a spectacle of light, and when viewed from a distance, the Nativity Scene is almost indiscernible, persons may also walk by the display thus creating an excessive government entanglement with religion proscribed by the First Amendment. Citizens Concerned, etc. v. City and County of Denver, 481 F.Supp. 522 (D.Colo. 1979).

Appeal was taken from the District Court's judgment on December 17, 1979. On December 18, 1979, City filed a motion with this Court to stay the enforcement of the District Court's judgment pending appellate review. That motion was granted on the same day. On December 19, 1979, Citizens filed a "Petition for Rehearing and a Suggestion for Rehearing en Banc" which was denied by this Court on December 28, 1979. On December 31, 1979, Citizens

applied to the United States Supreme Court to vacate the stay order granted by this Court. On January 21, 1980, the Supreme Court denied the application.

On appeal, City contends that the District Court's judgment should be reversed in that (1) the plaintiff has failed to prove its standing to litigate and obtain the relief requested, and (2) the Nativity Scene as displayed on the grounds of the City and County Building does not violate the First Amendment to the United States Constitution.

I.

City asks us to dismiss the action (and appeal) because of the failure of plaintiff to prove the requisite standing required under Article III, § 2 of the United States Constitution.

While recognizing that paragraph three (3) of the complaint alleges that plaintiff is an unincorporated association whose members are residents and taxpayers of the City and County of Denver and the State of Colorado who have paid taxes which are used in part to erect, maintain, display, disassemble, and store the creche scene, City argues that, nevertheless, the record is completely devoid of any evidence to establish the truth of those allegations. [Brief of appellant, p. 10]. City points out that the record does not evidence the identity of the members of the unincorporated association, whether they are taxpayers, or where they reside. City states that "admittedly, evidence was presented at the time of the hearing on this matter from witnesses that they were

residents of the City and County of Denver and State of Colorado. Yet, no evidence was submitted that these witnesses, or anyone else for that matter, were members of the plaintiff association." [Brief of appellant, p. 10].

In response to City's contention that standing has not been established, Citizens points to the allegations contained in paragraph 3 of its complaint, supra, and contends that City:

> ". . . does not argue, as it could not, see Flast v. Cohen, 392 U.S. 83 (1960), that taxpayers lack standing to raise claims of Establishment Clause violations. Defendant's position in its Brief, at 10-11, is that because plaintiff did not put on testimony at

the trial to establish the truth of those factual allegations, the case must be dismissed for lack of standing. Where defendant's argument fails, however, is in the fact that defendant never denied the allegations of paragraph 3 or otherwise put the question of jurisdiction at issue. Only when the facts claimed as the basis for jurisdiction are challenged must plaintiff prove them. KVOS, Inc. v. Associated Press, 299 U.S. 269, 277-78 (1936); Stern v. Beer, 200 F.2d 794, 796 (6th Cir. 1952) ("Unless . . . challenged, the jurisdictional question is determined by the allegations."); see Biggs v. Public Service Coordinated Transport, 280 F.2d

311, 314 (3d Cir. 1960).

Rule 8(d), Fed. R. Civ. P., states that the effect of a failure to deny facts alleged in the complaint is to admit them. The cases cited above make it clear that such is the case with jurisdictional facts as well. Defendant has never filed an answer in the case and by stipulating to consolidation pursuant to Rule 65(a)(2), Fed. R. Civ. P., waived the right to do so. Allegations in the Complaint not put at issue during the hearing on plaintiff's motion for a preliminary injunction must, therefore, be deemed admitted.

[Brief of Appellee, pp. 11, 12].

In its reply brief, City states that the contention that City's failure to raise the standing issue at the hearing forever bars appellate review of the issue is without merit in that the United States Supreme Court in a series of decisions, citing to Regents of University of California v. Bakke, 438 U.S. 265, 280-281 n. 14 (1978)(Powell, J.); Juidice v. Vail, 430 U.S. 327, 331 (1977); Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 260-262 (1977), has held that the standing doctrine has evolved as a doctrine of constitutional limitation on the federal judicial power found in the "case or controversy" language of Article III, § 2 of the United States Constitution which, notwithstanding that neither of the parties

raised the issue, nevertheless obligates the federal courts to examine the standing of appellees as a matter of the "case or controversy" requirement associated with Article III. [Appellant's Reply Brief, pp. 1, 2]. In further reply, City addresses Citizens' contention that City admitted the jurisdictional allegations contained in paragraph 3 of the complaint because Fed. Rules Civ. Proc. rule 8(d), 28 U.S.C.A. operates as an admission of the standing allegations inasmuch as City did not deny the allegations in a responsive pleading.

City contends that at the date of the hearing, no responsive pleading was required under rule 8(d), supra, inasmuch as the summons, issued pursuant to Fed. Rules Civ. Proc. rule 12, 28 U.S.C.A. required

the City to answer the complaint within twenty days from service and that, accordingly, an answer was not due until December 27, 1979. City points out that the hearing from which this appeal lies was conducted on December 12, 1979, five days after service was affected and fifteen days before the City's answer was due. [Reply brief of Appellant, pp. 2, 3]. Finally, City argues that Citizens, in an attempt to compensate for its failure to prove its standing, improperly contends that City waived its right to file an answer (and, therefore, admitted the allegations of paragraph 3) by stipulating pursuant to Fed. Rules Civ. Proc. rule 65(a)(2), 28 U.S.C.A. to a consolidation of the preliminary hearing with a hearing on the merits. City states that Citizens'

argument misconstrues the legal effect of the waiver because it disregards the express language of the second sentence of rule 8(d), Fed. Rules Civ. Proc., which reads "Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided."

We hold that this appeal must be dismissed on the ground that the party plaintiff, appellee here, Citizens, has failed to establish on the record that any constitutionally protected interest of it or its members has been abridged by the challenged display of the Nativity Scene. Insofar as this record is concerned, Citizens is an unincorporated association without articles, by-laws, formal or informal charter, or any identifiable organizational structure, purpose or design.

There are no averments relative to membership participation in Citizens or, for that matter, any criteria governing membership. Furthermore, the record does not identify a single person as a member of the named plaintiff, Citizens, and its witnesses at the District Court hearing were not identified either as members of Citizens or as taxpayers of the City and County of Denver and the State of Colorado.

The threshold issue, then, is whether, at the date of the District Court's order, it was vested with jurisdiction. Insofar as the record reflects, jurisdiction was assumed by the District Court.

Standing to sue, like mootness and ripeness, ". . . has its constitutional origins in the 'case or controversy' limi-

tation of Article III which insures that courts exercise their power only in cases where true adversary context allows informed judicial resolution." Wiley v. Nat. Collegiate Athletic Ass'n., 612 F.2d 473, 475 (10th Cir. 1979). See also: Hackbart v. Cincinnati Bengals, Inc., 601 F.2d 516 (10th Cir. 1979), cert. denied, __ U.S. ___, 100 S.Ct. 275 (1980); Napier v. Gertrude, 542 F.2d 825 (10th Cir. 1976), cert. denied 429 U.S. 1049 (1977); Nichols v. United States, 460 F.2d 671 (10th Cir. 1972), cert. denied 409 U.S. 966 (1972); Wright-Miller-Cooper, Federal Practice and Procedure, Vol. 13 and Cum. Supp., § 3531.

The question of "standing" to sue has been well stated:

The question of standing--of

whether "a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy" [Sierra Club v. Morton, 405 U.S. 727, 731 (1972)] differs from all of the other elements of justiciability [See §§ 3-90 to 3-16, supra] by focusing primarily "on the party seeking to get his complaint before a federal court" and only secondarily "on the issues he wishes to have adjudicated." [Flast v. Cohen, 392 U.S. 83, 99 (1968)(emphasis added).] Standing problems are currently analyzed by the Supreme Court in terms of two inquiries: (a) "whether the [party] alleges

that the challenged action has caused him injury in fact, economic or otherwise," and (b) "whether the interest sought to be protected by the complainant is arguably within the zone of interests [sought] to be protected or regulated by the statute or constitutional guarantee in question." [Association of Data Processing Service Organizations v. Camp, 397 U.S. 150, 152, 153 (emphasis added).] [Although this precise formulation was shaped to meet a challenge to administrative action on federal statutory grounds, it has become the standard formula in federal constitutional challenges to legislative, executive and administrative acts

alike. . . .]

Tribe, American Constitutional Law, Standing, § 3-17, pp. 79, 80 (1978). See also: Davis, Administrative Law of the Seventies, Supplementing Administrative Law Treatise, Standing, §§ 22.02-11 through 22.20 (1976 as supplemented 1980).

The direct "standing" issue presented here is whether, on the state of the record, the named plaintiff lacked standing to seek the relief obtained against the defendant on any ground advanced. Citizens lacked such standing. This is necessarily so because there is no showing of any direct, or even casual connection, between the challenged creche display constituting the alleged First Amendment

constitutional violation, and any injury in fact to the named plaintiff, Citizens. Furthermore, the action cannot be "saved" by reliance on the "standing" of officers or members of Citizens simply because this record is barren of any identification of a single person qualifying as such. Put another way, the record does not reflect that Citizens qualifies as a litigant entitled to invoke the jurisdiction of a federal district court to decide the merits of a dispute involving alleged violations of the United States Constitution in the Article III "case or controversy" context, Warth v. Seldin, 422 U.S. 490 (1975), or that any facts have been proved conferring standing on its members. In Broadrick v. Oklahoma, 413 U.S. 601, 610-611 (1973) the Court observed that ". . . constitutional rights

are personal and may not be asserted vicariously. See McGowan v. Maryland, 366 U.S. 420, 429-430 (1961). These principles rest on more than the fussiness of judges. They reflect the conviction that under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the nation's laws. See Younger v. Harris, 401 U.S. 37, 52 (1971)."

In Duke Power Co. v. Carolina Env. Study Group, Inc., 438 U.S. 59 (1978), the Supreme Court recognized "injury in fact" as the one constant element in judicial statements concerning standing:

> The essence of the standing inquiry is whether the parties seeking to invoke the court's jurisdiction have "alleged such a

personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." Baker v. Carr, 369 U.S. 186, 204 (1962). As refined by subsequent reformulation, this requirement of a "personal stake" has come to be understood to require not only a "distinct and palpable injury", to the plaintiff, Warth v. Seldin, 422 U.S. 490, 501 (1975), but also a "fairly traceable" casual connection between the claimed injury and the challenged conduct. Arlington Heights v. Metropolitan

Housing Dev. Corp., 429 U.S. 252, 261 (1977).

438 U.S. at p. 72.

In Warth v. Seldin, supra, the Supreme Court required a heavy burden of pleading in order to meet the standing requirements, i.e., that the complainant must clearly allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers.

Sierra Club v. Morton, 405 U.S. 727 (1972) involved an action by Sierra Club, a membership corporation with a "special interest in the conservation and sound maintenance of the national parks, game refuges, and forests of the country" for a declaratory judgment and an injunction to restrain federal officials from approving

a ski development project in the Sequoia National Forest. The District Court granted the injunction. The Court of Appeals reversed on the ground that the named plaintiff was without standing to litigate the issue. The Supreme Court affirmed. The Supreme Court observed that Congress may not confer jurisdiction on Article III federal courts to render advisory opinions, entertain "friendly" suits, or resolve "political questions". Where, however, a dispute is otherwise justiciable (as in the case at bar) the question of whether the litigant is the proper party to request an adjudication of a particular issue depends upon whether that litigant has established a sufficient stake in the controversy to obtain judicial resolution of the dispute.

The named plaintiff, Sierra Club, alleged that it and its members would be injured by the changes in the aesthetics and ecology of the area. The Court held that such allegations failed to invoke the jurisdiction of the federal courts because the Sierra Club did not allege that it or its members would be affected in any way in their activities or pastimes in the area as a result of the development. The Court observed:

> But the "injury in fact" test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured.
>
> * * *
>
> The Club apparently regarded any allegations of individualized

injury as superfluous, on the theory that this was a "public" action involving questions as to the use of natural resources, and that the Club's longstanding concern with and expertise in such matters was sufficient to give it standing as a "representative of the public".

* * *

We noted this development (recognition of injuries other than economic harm) with approval in Data Processing, 397 U.S. at 154, in saying that the interest alleged to have been injured "may reflect 'aesthetic, conservational, and recreational' as well as economic values." But broadening the

> categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury. [Emphasis supplied].
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> 405 U.S. at pp. 734, 735, 736, 738.

Thus, a party must clearly demonstrate by facts alleged that "he himself is adversely affected" or those he represents have been "injured in fact". Sierra Club v. Morton, supra; Data Processing Service v. Camp, 397 U.S. 150 (1970).

Parties may not by stipulation invoke judicial power of the United States in litigation which does not present an actual case or controversy, Memphis Light,

Gas & Water Division v. Craft, 436 U.S. 1 (1978), Sosna v. Iowa, 419 U.S. 393 (1975), Richardson v. Ramirez, 418 U.S. 24 (1974), and jurisdictional questions are of primary consideration and can be raised at any time by courts on their own motion. McGrath v. Kristensen, 340 U.S. 162 (1950); First State Bank, etc. v. Sand Springs State Bank, 528 F.2d 350 (10th Cir. 1976); Bledsoe v. Wirtz, 384 F.2d 767 (10th Cir. 1967).

Citizens has not established standing to sue in its own right. There is no showing that the creche scene in the Christmas display will in anywise impair the functions and activities of Citizens. There is no contention that Citizens will suffer any economic loss or injury--or any other injury--as a result of the alleged

First Amendment violation. Citizens has not alleged or proved that it is a person which may be adversely affected by the challenged display. Thus, it has failed to demonstrate a "personal stake" in the outcome of the controversy or, for that matter, that it is an organization deeply interested in the problem. The record is devoid of any demonstrable identification of Citizens in an organizational sense which could bring it within the realm of an "aggrieved person" suffering an invasion of a legal right. In Sierra Club v. Morton, supra, this was well articulated:

> The requirement that a party seeking review must allege facts showing that he is himself adversely affected does not insulate executive action from judicial

> review, nor does it prevent any public interests from being protected through the judicial process. It does serve as at least a rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome.
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> 405 U.S. at p. 740.

The record is barren of any identification of a single member (officer or otherwise) of Citizens. Thus, there is no showing that officers or members of Citizens have that necessary "personal stake" required for demonstration of injury in fact. In terms of the "legal wrongs" or "zones of interests" tests relative to standing to sue, there must be some ar-

ticulable "cause and effect" relation to an identifiable "injury" attributable to a party litigant. A private litigant must, in order to have "standing" to sue, demonstrate a personal stake in the outcome and that he is the proper party to request adjudication of the particular issue. Flast v. Cohen, 392 U.S. 83 (1968). Article III courts cannot issue advisory opinions which cannot affect the rights of the parties in the case before them. North Carolina v. Rice, 404 U.S. 244 (1971); Oil Workers Union v. Missouri, 361 U.S. 363 (1960).

One of the most recent Supreme Court pronouncements on the doctrine of standing in the federal courts is Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91 (1979). The Court there significantly

observed that although standing is a matter dealt with at the earliest stages of litigation, usually on the pleadings, it sometimes remains to be seen whether the factual allegations of the complaint (sufficient if established by adequate proof) will be supported adequately by the evidence adduced at trial. The Court there reviewed important opinions relating to the status of the standing doctrine:

> The constitutional limits on standing eliminate claims in which the plaintiff has failed to make out a case or controversy between himself and the defendant. In order to satisfy Article III, the plaintiff must show that he personally has suffered some actual or threatened injury as a result

of the putatively illegal conduct of the defendant. . . . Otherwise, the exercise of federal jurisdiction "would be gratuitous and thus inconsistent with the Article III limitation." Simon v. Eastern Kentucky Welfare Org., supra, at 38.

Even when a case falls within these constitutional boundaries, a plaintiff may still lack standing under the prudential principles by which the judiciary seeks to avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to federal courts to those litigants best suited to assert a particular claim. For example, a

> litigant normally must assert an injury that is peculiar to himself or to a distinct group of which he is a part, rather than one "shared in substantially equal measure by all or a large class of citizens" Warth v. Seldin, supra, at 499. He also must assert his own legal interests rather than those of third parties. Ibid. Accord, Arlington Heights v. Metropolitan Housing Development Corp., supra, at 263.
>
> 441 U.S. at pp. 99, 100.

During the District Court hearing in the instant case, Citizens did not present any evidence, direct or circumstantial, relative to its organizational status, structure, purpose or relationship to or

with any person or persons. Witnesses called by Citizens did not testify relative to Citizens or their associational relationship thereto. Furthermore, no witness testified that he or she was a taxpayer of the City and County of Denver of the State of Colorado. To be sure, the witnesses did testify to matters going to the merits of the First Amendment claims.

Citizens relies substantially on two legal theories in defense of the standing challenge. First, Citizens contends that paragraph 3 of its complaint contained adequate factual allegations to establish standing. In a pleading sense, we agree. However, we cannot agree with Citizens' argument that because of City's failure to object to Citizens' standing, it (Citizens) was under no obligation to pre-

sent adequate proof at the District Court hearing supporting the paragraph 3 "standing" allegations. Citizens attempts to avoid this obligation on the basis that City did not deny the allegations in paragraph 3 or "otherwise put the question of jurisdiction at issue". [Brief of Appellee, p. 12]. Thus, Citizens argues that because the facts alleged in paragraph 3 were not challenged by City, they must be taken as true. Citizens relies on Fed. Rules Civ. Proc. rule 8(d), supra, for its authority in this regard, pointing out that the rule states that failure to deny facts alleged in the complaint, including jurisdictional facts, constitutes an admission. While recognizing that Citizens has not filed an answer (which was not due at the date of the hearing)

Citizens nevertheless argues that by stipulating to consolidate the hearing on the preliminary injunction with the hearing on the permanent injunction pursuant to Fed. Rules Civ. Proc. rule 65(a)(2), supra, City waived its right to file an answer.

We have heretofore observed that paragraph 3 complies with the pleading requirements of Fed. Rules Civ. Proc. rule 8, supra. Thus, under usual and routine litigative procedure, a defendant, under the theory of Fed. Rules Civ. Proc. rule 8(b) and (d), supra, must file a responsive pleading, whether it be an answer or a reply, setting forth his defenses to each claim asserted in the form of admission or denials. The purpose thus served is that allegations in the complaint not denied will stand admitted and

will not be at issue at trial and those allegations denied will require proof to be established by the plaintiff in order that he prevail. Here, the answer of City was not due when the hearing on the injunctive relief sought by Citizens was held. No contention is made that City was required to file an answer or other pleading prior to the hearing. Thus, there was no statutory failure on the part of City to plead. Nor could there be, inasmuch as no responsive pleading was required at the date of the hearing on the petition for grant of a preliminary injunction. The last sentence of rule 8(d), supra, explicitly provides: "Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided." Thus, in our view, the

burden of establishing all jurisdictional facts was squarely that of the petitioner, Citizens, when the District Court hearing was held.

The policies reflected in the enactment of the 1966 amendment to rule 65 [subsection (a)(2)] were designed to efficiently expedite final disposition of an injunctive action. This subsection was added to provide that a hearing on a preliminary injunction may be added to provide that a hearing on a preliminary injunction may be consolidated with one on the merits, so that any evidence introduced at a rule 65(a) hearing (for a preliminary injunction) that would be admissible at trial becomes part of the record and thus need not be repeated upon the trial. The Advisory Committee in its

note to the amendment (39 F.R.D. 124, 125) states that the new subdivision "reflect[s] the substance of the best current practice and introduces no novel conception." The statements of the Advisory Committee indicate--and there is no legislative history contra--that rule 65, supra, with its amendments and additions was designed solely as a procedural tool to expedite the action and accommodate the court and the litigants. Such consolidation may obviously avoid having the same evidence presented both at the preliminary injunction stage and later at trial at the permanent injunction stage. Thus, such a consolidation generally saves considerable time at trial by eliminating unnecessary evidentiary redundancy. Wright & Miller, Federal Practice and Procedure: Civil §

2950; 42 Am.Jur.2d §§ 286, 287. Of paramount significance here, however, rule 65, supra, does not confer either subject matter or personal jurisdiction on the court. Wright & Miller, Federal Practice and Procedure: Civil § 2941. It has been noted that the subject of injunctions in the federal courts has a three-fold aspect: (1) jurisdictional, i.e., power to entertain the action, and control of the subject matter and the parties; (2) propriety of issuing the injunction, sometimes referred to as "equitable jurisdiction", and (3) procedural, i.e., control of the issuance of an injunctive order. Rule 65, supra, affects only the third factor in that it determines only the method of seeking and obtaining any sort of an injunction. Accordingly, it

has no relationship to or bearing on either the jurisdiction to exercise or the propriety of exercising the injunctive power. 7-Pt. 2 Moore's Federal Practice § 65.03[1]. Thus, rule 65 confers no jurisdiction. 7-Pt. 2 Moore's Federal Practice § 65.03[3].

It is fundamental that mandatory injunctive relief should be granted only under compelling circumstances inasmuch as it is a harsh remedial process not favored by the courts. 42 Am.Jur.2d, Injunctions, §§ 16, 20. It is only available following a final hearing governed by hearings in equity suits generally relating to rules of evidence, reference and the Federal Rules of Civil Procedure. 27 Am.Jur.2d, Equity, §§ 235, 236. Thus, the party seeking the injunction must prove his own

case and adduce the requisite proof, by a preponderance of the evidence, of the conditions and circumstances upon which he bases the right to and necessity for injunctive relief. 42 Am.Jur.2d, Injunctions, § 287; 19 A.L.R.3d 492.

We have heretofore observed that in its brief, Citizens invoked Flast v. Cohen, supra, for the broad-sweeping rule that taxpayers have standing to raise claims of First Amendment Establishment Clause violations. That the rule in Flast is not as "sweeping" as Citizens urges was, in our view, articulated by the Supreme Court in United States v. Richardson, 418 U.S. 166 (1974), where the Court observed:

> Although . . . Flast v. Cohen, supra, is a starting point

in an examination of respondent's claim to prosecute this suit as a tax-payer, that case must be read with reference to its principal predecessor, Frothingham v. Mellon, 262 U.S. 447 (1923). In Frothingham, the injury alleged was that the congressional enactment challenged as unconstitutional would, if implemented, increase the complainant's future federal income taxes. Denying standing, the Frothingham court rested on the "comparatively minute[,] remote, fluctuating and uncertain," id., at 487, impact on the taxpayer, and the failure to allege the kind of direct injury required for standing.

> "The party who invokes the [judicial] power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." Id., at 488.

. . . While the "impenetrable barrier to suits against Acts of Congress brought by individuals who can assert only the interest of federal taxpayers," id., at 85, had been slightly lowered, the [Flast v. Cohen] Court made clear

it was reaffirming the principle of Frothingham precluding a taxpayer's use of "a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System." Id., at 106

Although the Court made it very explicit in Flast that a "fundamental aspect of standing" is that it focuses primarily on the party seeking to get his complaint before the federal court rather than "on the issues he wishes to have adjudicated" . . . [here] . . . While we can hardly dispute that this respondent has a genuine interest in the use of the

funds and that his interest may be prompted by his status as a taxpayer, he has not alleged that, as a taxpayer, he is in danger of suffering any particular concrete injury as a result of the operation of this statute. As the Court noted in Sierra Club v. Morton, 405 U.S. 727 (1972): "[A] mere 'interest in a problem' no matter how long-standing the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved' within the meaning of the APA." Id., at 739. [Footnote omitted].

418 U.S. at pp. 171, 172, 173, 174, 177.

See also: Wright, Law of the Federal Courts, 3d Ed., § 13 "Case or Controversy" - Standing to Litigate, pp. 42-52.

In Penn v. San Juan Hospital, Inc., 528 F.2d 1181 (10th Cir. 1975), we recognized that while the object of a preliminary injunction is to preserve the status quo pending the litigation on the merits, it is distinguishable, in terms of proof, in that while (a) it is not necessary that the plaintiff establish to a certainty at a hearing on application for a temporary injunction that he is entitled to relief on the merits, but rather that he is entitled to relief on the merits, but rather that his success is probable; (b) at a hearing upon consolidation pursuant

to rule 65(a)(2), supra, for permanent injunction, the plaintiff cannot hold back evidence and must fully develop his case. We there cited to 7 J. Moore, Federal Practice, par. 65.04(4), pp. 6566-65-67. See 528 F.2d at p. 1187. Part and parcel of the full development of the case pursuant to a rule 65(a)(2), supra, hearing must necessarily involve proof that the party plaintiff is the real party in interest. See Fed. Rules Civ. Proc., rule 17(a), 28 U.S.C.A.; 59 Am.Jur. 2d, Parties, § 38. There is a difference between capacity to sue and standing to sue. The former relates to the right to come into court, while the latter relates to the right to relief. See 69 A.L.R.3d 1142. In Boeing Airplane Company v. Perry, 322 F.2d 589 (10th Cir. 1963),

cert. denied, 375 U.S. 984 (1964), we said:

> Every civil action in the federal courts must, of course, be prosecuted in the name of the real party in interest. And the "real party in interest" is the one who, under applicable substantive law, has the legal right to bring the suit. See: Hoeppner Construction Company v. United States, 10 Cir., 287 F.2d 108. Accordingly, an administrator may bring the suit in his own name without joining the parties for whose benefit it is brought, if by the law of the forum he may do so. See: F. R. Civ. P., Rule 17(a); third sentence, Rule 17(b);

Federal Practice and Procedure, Barron & Holtzoff, Ch. 8, § 486; and Moore's Federal Practice, Vol. 3, § 17.18.

322 F.2d at p. 591.

Thus, in light of the absence of any evidence of standing, we are compelled to exercise judicial restraint in declining to speculate on the standing issue. By focusing, as we must, on the party seeking relief, we observe that this record on appeal does not contain a scintilla of evidence that the plaintiff (Citizens) is within the zone of interest protected by the First Amendment or has suffered any injury in fact by reason of its violation as invoked in the complaint. See Natural Res. Def. Coun., Inc. v. United States Env. P. Ag'cy., 481 F.2d 116 (10th Cir. 1973).

A federal court must in every case, and at every stage of the proceeding, satisfy itself as to its own jurisdiction, and the court is not bound by the acts or pleadings of the parties. Treines v. Sunshine Min. Co., 308 U.S. 66 (1939); McNutt v. General Motors Acceptance Corp., 298 U.S. 178 (1936); 12 A.L.R.2d 12; 47 A.L.R.2d 646. This obligation and duty to be watchful of the question of jurisdiction extends full measure to the federal appellate court which must satisfy itself of its own jurisdiction and that of the district court. Mitchell v. Maurer, 293 U.S. 237 (1934); Minnesota v. Hitchcock, 185 U.S. 373 (1902). "Although raised by neither of the parties, we are first obligated to examine the standing of appellees, as a matter of the case-or-

controversy requirement associated with Art. III, to seek injunctive relief in the District Court. North Carolina v. Rice, 404 U.S. 244 (1971); O'Shea v. Littleton, 414 U.S. 488, 493-498 (1974)." Juidice v. Vail, supra, at p. 331.

II.

In light of our holding that we are without jurisdiction over this cause on appeal, we cannot reach the merits of the dispute involving the alleged violation of the Establishment Clause of the First Amendment to the United States Constitution by reason of the Nativity Scene display.

The appeal is dismissed and the cause is remanded to the District Court with instruction to vacate the judgment of December 17, 1979, for want of jurisdiction.

APPENDIX B

Before Honorable James E. Barrett, Honorable William E. Doyle, and Honorable Monroe G. McKay, Circuit Judges

THE CITY AND COUNTY OF DENVER, Petitioner, v. THE HONORABLE RICHARD P. MATSCH, Judge, United States District Court, Respondent, and CITIZENS CONCERNED FOR SEPARATION OF CHURCH AND STATE, Real Party in Interest.	)	No. 80-2087 MEMORANDUM ORDER GRANTING PETITION FOR WRIT OF PROHIBITION

BARRETT, Circuit Judge:

THIS MATTER is before the Court on a Petition for Writ of Prohibition filed by the City and County of Denver seeking an order prohibiting the United States District Court for the District of Colorado and the Honorable Richard P. Matsch, presiding, from conducting further proceedings in Civil Action No. 79-M-1605, styled Citizens Concerned for Separation of Church and State v. The City and County of Denver.

Following the filing of the petition, this Court stayed the District Court's order of October 14, 1980, setting down Plaintiff's Motion for Jurisdictional Hearing for October 24, 1980, at 1:30 p.m. In accordance with Rule 21(b), Fed. Rules of App. Proc., 28 U.S.C., we further ordered that (a) Real Party in Interest, Citizens Concerned for Separation of Church and State, file an answer to Petition on or before October 30, 1980, at 5:00 p.m., and (b) the respective parties to this controversy file concurrent type-written briefs directed to the power of the District Court to entertain the jurisdictional hearing in light of our prior opinion in No. 79-2303, Citizens Concerned, Etc. v. City and Cty. of Denver, 628 F.2d 1289 (10th Cir. 1980).

On October 30, 1980, Citizens Concerned for Separation of Church and State (hereinafter referred to as Citizens) filed its "Response", thereafter supplemented on November 3, 1980. Petitioner, The City and County of Denver (hereinafter referred to as City-County) did not file a supplemental brief on or before November 3, 1980, apparently relying on its contentions and authorities cited in its Petition for Writ of Prohibition. Respondent, Honorable Richard P. Matsch, Judge, United States District Court, has not filed an appearance. We have determined that oral arguments would not lend material assistance to the Court and, accordingly, the Petition is considered on the record, pleadings, responses and briefs.

Preliminary Background

On September 4, 1980, this Court rendered its opinion in Citizens Concerned, Etc. v. City and Cty. of Denver, supra, whereby, in conclusion, we stated:

> In light of our holding that we are without jurisdiction over this cause on appeal, we cannot reach the merits of the dispute involving the alleged violation of the Establishment Clause of the First Amendment to the United States Constitution by reason of the Nativity Scene display.
>
> The appeal is dismissed and the cause is remanded to the District Court with instruction to vacate the judgment of December 17, 1979, for want of jurisdiction. 628 F.2d at p. 1301.

On October 6, 1980, Citizens filed a Motion for Jurisdictional Hearing with the District Court, seeking to cure its failure to prove standing to sue at the consolidated hearing leading to this Court's opinion of September 4, 1980. On October 14, 1980, the District Court, over objection of City-County, entered its "Memorandum Opinion and Order Interpreting Mandate, Vacating Judgment and Directing Evidentiary Hearing on Jurisdiction".

The Court noted that at the October 14th hearing, Citizens ". . . made an offer of proof, indicating that if an opportunity is provided, the plaintiff would establish that it is a voluntary association whose members are citizens and taxpayers of the City and County of Denver who are adversely affected by the City's

inclusion of a religious scene in the annual lighting display at the City and County Building and that such evidence would clearly establish standing and jurisdiction for the case or controversy brought in this civil action." At the same hearing, City-County was asked if it intended to construct a lighting display, including the Nativity Scene in a manner comparable with that shown in the evidentiary record of this case in December, 1980 and January, 1981. The response was that the City-County did intend to construct such a display for this holiday season.

The Court cited to Coppedge v. Clinton, 72 F.2d 531 (10th Cir. 1934) for the proposition that a full retrial of the merits should not be required where the

issue of jurisdiction was first raised on appeal and that a hearing on the issue should be held on remand. The District Court noted that this Court did not direct dismissal of the action, as urged by City-County, but ". . . only directed the vacation of the judgment entered in this court on December 17, 1979." The District Court further cited Estate of Whitlock v. Commissioner of Internal Revenue, 547 F.2d 506 (10th Cir. 1976), cert. denied, 430 U.S. 916 (1977), for the proposition ". . . that the opinion of the appellate court may be consulted to determine the intent of its mandate and that if the lower court believes the mandate to be unclear, it can make a decision reflecting its understanding of that mandate."

Based thereon, and while recognizing that the "acute awareness of the public interest shown in the previous proceedings in this case and the divisive effect it has had" the Court found and concluded ". . . that this Court has not been directed to dismiss the action and that it has jurisdiction to determine standing and, therefore, to determine whether a justiciable case or controversy was before this Court at the time of the hearing on December 12, 1979. . ."

Contentions of the Parties

It is City-County's position that the Trial Court's order convening a "jurisdictional hearing" is in excess of its authority under our mandate which ". . . granted no relief to the Respondent [Citizens] but simply remanded for the

vacation of the trial court's judgment for want of jurisdiction."

Citizens contends that the District Court's decision to take evidence on standing does not constitute an abuse of discretion justifying the issuance of the Writ of Prohibition, citing to Sierra Club v. Morton, 405 U.S. 727, 735-736, n. 8 (1972), Warth v. Seldin, 422 U.S. 490, 501-502 (1975), Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 45, n. 25 (1976), Gladstone Realtors v. Village of Bellwood, 444 U.S. 91, 109, n. 22 (1979), Whitelock v. Leatherman, 460 F.2d 507, 515 (10th Cir. 1972) and Buell v. Sears, Roebuck and Co., 321 F.2d 468, 471 (10th Cir. 1963) for the proposition that "Litigants are to be given full opportunity to correct any deficiencies in

allegations or proof in order to sustain their standing before the federal courts."

Our Disposition

A.

In our view, the authorities relied upon by the Trial Court and Citizens miss the mark.

Coppedge v. Clinton, supra, does not support the District Court's order. The challenge there was lack of jurisdiction for want of requisite diversity of citizenship. This Court did, to be sure, remand for trial on the jurisdictional issue only. The remand in Coppedge, unlike the remand in the instant case, was predicated on the use of improper legal criteria applied by the trial court. Such was not the problem in the case at bar. Jurisdiction was simply not established, al-

though properly plead. No mistake in application of legal doctrines or criteria led to the deficiency in this case, as in Coppedge. There is no similarity between the two cases.

In the instant case, there is no basis in the record to support the judgment, notwithstanding the fact, as previously observed, that paragraph 3 of Citizens' complaint did, in a pleading sense, contain ". . . adequate factual allegations to establish standing." Thus, we clearly recognized that there was no deficiency in Citizens' complaint, per se, but that under the circumstances of the proceedings (no answer filed or required and cause submitted on a consolidation of the preliminary with the permanent injunction request as permitted under Rule 65(a)(2))

that ". . . the burden of establishing all jurisdictional facts was squarely that of the petitioner, Citizens, when the District Court hearing was held." (628 F.2d at p. 1298). We further said that ". . . at a hearing upon consolidation pursuant to rule 65(a)(2), supra, for permanent injunction, the plaintiff cannot hold back evidence and must fully develop his case" (628 F.2d at p. 1300) and ". . . this appeal must be dismissed on the ground that . . . Citizens, has failed to establish on the record that any constitutionally protected interest of it or its members has been abridged by the challenged display of the Nativity Scene." (628 F.2d at p. 1294).

Citizens' reliance on Sierra Club v. Morton, supra, Warth v. Seldin, supra,

Simon v. Eastern Ky. Welfare Rights Org., supra, Gladstone Realtors v. Village of Bellwood, supra, Whitelock v. Leatherman, supra, and Buell v. Sears, Roebuck and Co., supra, is misplaced. Those opinions deal with defects in pleadings relating to the adequacy of allegations of standing. They hold that litigants should be accorded liberal rights to amend the complaint or by other pleadings in order to cure the jurisdictional defects existing in the allegations. We have no quarrel with those decisions. They do not, however, apply to the case at bar.

We reiterate and emphasize that no jurisdictional defects existed in the complaint or allegations in the case at bar. We specially recognized this fact in our opinion. The defect, we pointedly

observed, was that of proof. Citizens failed to ". . . present any evidence, direct or circumstantial, relative to its organizational status, structure, purpose or relationship with any person or persons. Witnesses called by Citizens did not testify relative to Citizens or their associational relationship thereto. Furthermore, no witness testified that he or she was a taxpayer of the City and County of Denver of the State of Colorado. To be sure, the witnesses did testify to matters going to the merits of the First Amendment claims." (628 F.2d at p. 1298).

Thus, reliance on a long line of cases, including Whitelock v. Leatherman, supra, and Buell v. Sears, supra, decided by this Court, which recognized that jurisdictional defects which could be

cured by proper amendment of the pleadings (technical omissions obvious in the record) should be conditionally required on remand in order to serve the interest of conservation of judicial resources, has no application here. This is so simply because there have never been any defects in the complaint or pleadings. The sole defect was and is in the utter failure to present any evidence proving its jurisdictional requisite of standing.

B.

Article III of the Constitution limits federal judicial power--i.e., federal court jurisdiction--to "cases" and "controversies". The limitation has been said to serve two complementary purposes--first, it limits the business of the federal courts to "questions presented in

an adversary context and in a form historically viewed as capable of resolution through the judicial process" and, second, it defines the "role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government." Flast v. Cohen, 392 U.S. 83, 95 (1968).

We have previously opined that, on its face, and from the record, there is no question that the issue presented for appellate resolution--the substantial issue involving the display of the Nativity Scene under the circumstances of the record--unquestionably meets the adversarial criteria in a form capable of resolution. What we are now deeply concerned with, however, is a determination

of whether the "personal-stake" requirement relating to the first purpose of the "case-or-controversy" doctrine can be "rehabilitated" in a record leading to judgment completely devoid of evidence establishing standing in the "personal stake" sense by means of a supplemental proceeding directed solely to such evidence. In terms of preservation of valuable judicial time and resources--and that of the interested parties--such a proceeding has great merit. It does not, however, aid us in squarely facing the "personal stake" requirement, because, in its absence, the judgment rendered is void, not voidable.

The threshold requirement of standing in the "personal stake" concern to assure that the "concrete injury required by

Article III" is satisfied throughout the action. Sosna v. Iowa, 419 U.S. 393 (1975). An actual "case or controversy" in the constitutional sense "must be extant at all stages of review." Preiser v. Newkirk, 422 U.S. 395, 401 (1975). Inasmuch, then, as the issue is one of power, the practical importance of review cannot control. Sosna v. Iowa, supra; Richardson v. Ramirez, 418 U.S. 24, 36 (1974). Furthermore, great public interest in the outcome of the issue in controversy cannot serve as a substitute or replacement for the necessary individual interest in the outcome. DeFunis v. Odegaard, 416 U.S. 312 (1974).

Mr. Justice Powell, in his dissenting opinion in United States Parole Comm'n. v. Geraghty, 445 U.S. 388, 409 (1980), per-

tinently observed, inter alia:

> Cases that no longer "'touc[h] the legal relations of parties having adverse legal interests,'" are moot because "federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." North Carolina v. Rice, 404 U.S. 244, 246 (1971) . . .
>
> * * *
>
> . . . the rule barring litigation by those who have no interest of their own at stake is applied so rigorously that it has been termed the "one major proposition" in the law of standing to which "the federal

courts have consistently adhered . . . without exception." Davis, Standing: Taxpayers and Others, 35 U. Chi. L. Rev. 601, 617 (1968). . . . We have insisted upon the personal stake requirements in mootness and standing cases because it is embedded in the case-or-controversy limitation imposed by the Constitution, "founded in concern about the proper--and properly limited--role of the courts in a democratic society." Warth v. Seldin, 422 U.S., at 498.

455 U.S. at pp. 411, 412.

C.

The Petition is hereby granted.[1] The District Court is directed to cease and

desist from conducting further hearings or proceedings in this cause. The judgment of the District Court of December 17, 1979, vacated by this Court for want of jurisdiction is a nullity. In vacating the judgment, it was the clear intent of this Court to dismiss the underlying complaint and action for failure to comply with fundamental jurisdictional prerequisites.

Let the Writ Issue.

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[1]Although the Petition requests the issuance of a writ of prohibition, we ha held that "mandamus is the proper remedy to enforce compliance with a mandate." Estate of Whitlock v. C.I.R., 547 F.2d at p. 510.

McKay, Circuit Judge, concurs in the result.

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DOYLE, Circuit Judge, dissenting.

I respectfully disagree with the majority opinion.

The cause has been, it is true, ordered to be dismissed and at least part of Judge Barrett's opinion is correct for the reason that there is nothing left of the lawsuit and therefore, there is nothing to repair or add to it. No doubt this is true. That factor can be remedied easily however by an order reinstating the complaint with directions to the district court to perform such repair work and additions as are necessary so that it passes procedural scrutiny. It is fundamental that where there is a lack of

jurisdiction it does not have any effect on the cause of action. No adjudication effecting the cause has been rendered. It follows, of course, that the complaint is open to amendment and such should have been carried out.

Furthermore we must take judicial notice of the fact that the plaintiffs have now filed a new action in the district court. That effectively results in this matter becoming moot. Hence it is unnecessary to pursue the issue of whether the complaint can be amended or not.

I am not criticising the form and content of Judge Barrett's opinion. It is well prepared and written in characteristically good style. I am merely stressing the importance of getting this matter into a posture which will allow the

merits to be considered and determined. Preferably it should not become an eviction type of problem.

APPENDIX C

NOVEMBER TERM - January 8, 1981

Before Honorable Oliver Seth, Chief Judge, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan and Honorable Stephanie K. Seymour, Circuit Judges.

THE CITY AND COUNTY of Denver,	)	
Petitioners,	)	No. 80-2087
CITIZENS CONCERNED FOR SEPARATION OF CHURCH AND STATE,	)	
Respondents.	)	
CITIZENS CONCERNED FOR SEPARATION OF CHURCH AND STATE,	)	

This matter comes on for consideration of appellee's motion for rehearing and suggestion for rehearing en banc.

Upon consideration whereof, the petition for rehearing is denied by the members of the panel who rendered the decision sought to be reheard.

The clerk having transmitted the suggestion for rehearing en banc to the members of the panel and the judges of the court who are in regular active service, and no member of the panel, nor judge in regular active service having requested a vote of such suggestion, the suggestion for rehearing en banc is denied. Rule 35, Federal Rules of Appellate Procedure.

/s/
HOWARD K. PHILLIPS,
Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 79-M-1605

CITIZENS CONCERNED FOR SEPARATION OF CHURCH AND STATE,

Plaintiff,

v.

THE CITY AND COUNTY OF DENVER,

Defendant.

MATSCH, Judge

MEMORANDUM OPINION AND ORDER

This is a civil action by an unincorporated association of residents and taxpayers of the City and County of Denver, Colorado, appearing through the American Civil Liberties Union, seeking to enjoin the use of a Nativity Scene as a part of a

Christmas lighting display erected and maintained as a governmental activity of the City and County of Denver on the public property of the building which is the central headquarters of that government. The claim is under 42 U.S.C. § 1983 and jurisdiction is found in 28 U.S.C. § 1343 (3). At the hearing held on the plaintiff's motion for a preliminary injunction, the parties stipulated to a consolidation with the trial on the merits, as authorized in Rule 65(a)(2) of the Federal Rules of Civil Procedure. Accordingly, all of the evidence has been taken, the arguments have been heard, and the case is ready for final disposition.

For many years, Denver has had a lighting display at the City and County Building in downtown Denver during the

annual Christmas holiday season. Normally, the lights have been turned off after New Year's Day and then turned on again in midJanuary for the ten days of the National Western Stock Show.

Wilbur Latham has been working on such displays for the past forty years as a part of his regular employment with the City's Parks and Recreation Department. Mr. Latham has been the person responsible for planning and construction of such displays since 1956. Each year he has sought to arrange the lighting and physical objects used in differing configurations, recognizing that large numbers of people photograph the display each year and seek a variety of scenes.

Mr. Latham testified that there has always been a creche in the display.

Since 1962, that scene has consisted of life-size figurines of Mary, Joseph, the infant Jesus, shepherds, wise men, and domesticated animals. The figurines of Mary and Joseph are posed in a devotional attitude and they are within a barnlike structure with the baby in a manger. The scene is, therefore, a depiction of the birth of Christ as described in the writings of St. Matthew, St. John, and St. Luke.

The figurines used in the Nativity Scene were purchased by Denver with public funds in 1962. The annual display also includes comparably made figurines of Santa Claus, his sleigh and reindeer, and an elves' toy shop. These too were purchased with public funds. From time to time there have been some replacements and

repairs paid for by private donations.

The designed total effect of the display is to turn the entire front of the City and County Building into a spectacle of lights, and when viewed from a distance, the Nativity Scene is almost indiscernible. About ninety percent of the persons viewing this display do so from cars while driving by in front of the building. The Santa Claus and reindeer, the toy shop, and the creche are clearly distinguishable from that vantage point. Persons may also walk by the display; but the physical objects are fenced off for safety.

Before the display was erected in 1978, persons associated with the plaintiff's point of view requested the Mayor of Denver to exclude the Nativity Scene.

There was a strong public reaction with letters and petitions urging a rejection of that request and an adherence to tradition. The common contention in those communications was that it would be wrong to "take Christ out of Christmas."

In November 1979, counsel for the plaintiff appeared before the Denver City Council and again urged exclusion of the Nativity Scene in the 1979 display. That appeal was based upon the same ground urged in this lawsuit and both the Mayor and City Council denied the request. The complaint in this case was then filed on November 28, 1979, and, again, the issue was the subject of many petitions and letters to the Mayor, overwhelmingly in support of his position. To these communications, the Mayor addressed the fol-

lowing standard response:

> Thank you for your letter concerning the Nativity Scene in front of the City and County Building. I appreciate your taking the time to advise me of your thoughts in this regard. Please be assured that I do plan to keep the Nativity Scene in our traditional Christmas display unless I am ordered by the Courts to take it down.

The Nativity Scene had not yet been erected when this case was filed. At the time of trial, the Nativity Scene, Santa Claus, the reindeer, and the toy shop, were all in place on the front steps of the City and County Building. All of the other elements have also been incorporated

in the display and the lights are scheduled to be turned on for public viewing on the evening of Monday, December 17, 1979. A removal of the creche and a repositioning of the other objects on the front steps can be accomplished within one working day.

The plaintiff's contention is that the Nativity Scene is a religious symbol and that by including it in the Christmas display the City and County of Denver has violated the establishment clause of the First Amendment, which is incorporated in the Fourteenth Amendment to the United States Constitution. In considering that contention, this court is limited to the evidentiary record presented upon trial. Any personal beliefs or opinions must be excluded because they are as irrelevant as

is the predominant public opinion. The unique role of our Constitution is protection from all forms of tyranny, whether individual or collective.

The evidence presented at this trial is so overwhelmingly supportive of the plaintiffs' position, and the defendant's attempts to justify its politically popular stand on legal grounds have been so feeble, that there may be some question as to whether there is an actual legal controversy or an abdication of responsibility for decision making. It should be recognized that all who hold public office have an equal obligation to adhere to the United States Constitution. While the judicial branch has the undeniable duty to declare the invalidity of legislative and executive acts which violate the proscrip-

tions of the organic law, the courts should not be used merely for the convenience of those who wish to avoid the unpleasant consequences of a required resistance to the majoritarian view on a clamorous issue.

The only witness called by the defendant is a professor of religious studies who has been ordained in the United Church of Christ and has served as a pastor. After being qualified as an authority on religious symbols, the defendant's witness opined that while there is no universally accepted definition, it is generally agreed that such a symbol, unlike signs, awakens a depth of response and "participates in that to which it points." He accepted the creche as a religious symbol, without question, but expressed the view

that the depth of awakened response would vary among persons and according to the context in which it is displayed. Some would see it as a depiction of an historical event; some would see it as a depiction of a theological event; and the witness would object to the creche alone on the steps of City Hall, there was no religious experience for him in the context of the Christmas lighting display. He agreed that it would not surprise him to learn that both Christians and non-Christians may see the creche as a religious symbol in the display; but, he expressed concern that to remove it for that reason may have some chilling effect.

The plaintiff also called theologians who testified as expert witnesses. Another professor of theology who teaches

the philosophy of religion and who was also ordained in the United Church of Christ and has served as a minister in the Methodist and Congregational Churches testified that the Nativity Scene has been used as a teaching device for the indoctrination of illiterate persons since the Middle Ages. In his view, the contemporary role of the creche is to serve as a symbol, reminding the viewers of the incarnation of the deity, "a cosmic event of saving significance." Today, most Christians stress Jesus as the symbol of the redeeming power of God at work in the world and see the Nativity Scene as evoking strong feelings of joy and deep feelings of reverence in a way quite different from Santa Claus, Christmas lights, Christmas trees and other holiday ornamentation.

The witness further noted that there are many differences of opinion among scholars and theologians as to the date of the birth of Jesus Christ as an historical event. It is generally accepted that December 25 is not the anniversary of that birth. That date was established by Liberius, the Bishop of Rome, in the Fourth Century. It is also a time of significance in many other cultures and beliefs. The winter solstice has long been a season of celebration and pagan ritual.

The witness said that the blend of pagan and Christian aspects in the celebration of Christmas has been a matter as to which there have been significant separations of opinion among faiths and sects under the canopy of Christianity.

The Pilgrims, devoutly religious, prohibited the celebration of Christmas by idleness and idolatry; the Quakers have not been comfortable with the use of symbols, and Jehovah's Witnesses consider Christmas displays to be pagan.

The expert acknowledged that Christ is an important historical figure in Western culture but differs from such other historical persons as Abraham Lincoln, Christopher Columbus and Karl Marx in that Jesus is the central figure in Christianity. The witness expressed personal opposition to inclusion of the creche in the Denver Christmas display because he thinks it confuses the nature of the Christmas celebration and because he is aware of the sensitivity of others, recognizing that there is a history of

oppression affiliated with the establishment of any state religion. He expressed personal concern that such a use of a religious symbol may intensify divisiveness in the community.

The validity of that concern about devisive effects was demonstrated by the testimony of other witnesses called by the plaintiff. A lawyer who was raised in a Jewish family testified that she felt surprise and anger in viewing the 1978 display because the Nativity Scene represented a religious, mystical symbolism which has never been accepted in the Jewish religion and to her it was a painful reminder of the history of oppression of Jews. Her expressed concern was with the obvious connection between that symbolism and the city government. She had

no such feelings with respect to religious art in a city-owned museum.

A member of the American Atheists Society testified that he felt fear when he saw the creche in the display with what he perceived to be an obvious religious intent, recognizing that the majority religion in the United States is Christian, which he defined to be any faith which has the incarnation of God as a central tenet. To that witness, the impression was that the city endorses such faith contrary to his view that the Constitution protects him from an imposed religion. The atheist witness is married to a Roman Catholic and they have a Nativity Scene in their home during the Christmas season. He had no objection to such secular aspects of the Denver display

as Santa Claus, reindeer, the Christmas tree and others because to him they simply represent the winter solstice season.

A clinical psychologist with an expertise in child psychology testified that in her professional opinion such a public display of apparent governmental support of a majoritarian view has negative effects on the children in religious minority families because it tends to encourage prejudice among the majority, and because it encourages self-degredation and diminished self-esteem among the minority. She said that the parents of children in religious minority families, in attempting to deal with the conflicts which confront their children during the Christmas season, often emphasize the neutrality of government to ease the pressure of peer

conflict. Any weakening of that neutrality has an adverse effect upon that effort. She also testified that children function cognitively in a way which is much more rigid than with adults and that what may be benign to an adult would be very substantial to children. On cross-examination, she opined that when children view the Denver Christmas display, the Santa Claus and reindeer scene would have the most impact on children of religious minorities. The psychologist, who is Jewish, also offered her personal view that the Nativity Scene was somewhat offensive and frightening because she saw it as an affirmation of the religious belief of a particular group by a government, which should be neutral, and because to her it was a reminder of

consequences from more serious violations of neutrality in world history.

Another professor of religious studies, who is an ordained Episcopal priest, affirmed the accuracy of the testimony that the date for Christmas was established in the Fourth Century and that the date selected had been the time for a pagan celebration of the birth of the Invincible Sun. He too saw the creche as the symbol of the incarnation of God in Christ, and he described Christmas symbols such as Santa Claus, lights, trees, and others as different from the Nativity Scene because they are decorations which are not universally Christian. He called them mere "frosting on the cake" and the "cake is the creche." Thus, those items should be considered tangential, with the Nativity Scene being central.

A Quaker lawyer saw the 1978 Denver display, including the Nativity Scene, as the payment of tax money to put up a religious symbol, which some find contrary to their beliefs, and as giving an impression of implicit endorsement of Christianity over religious beliefs which do not focus on Christ. Her testimony was that Christ is recognized in her faith and that while Jesus is also an important historical figure, it is impossible to separate the religious role from the historical influence. She had no difficulty in considering Santa Claus as a totally secular symbol, even though that symbol of spirit and generosity evolved from Saint Nicholas, a Christian figure.

A computer scientist, who is a Unitarian, saw the entire display as

crassly commercial and inartistic. He also saw it as participation by Denver in a religious observance, contrary to the separation of church and state, which Unitarians have urged as a basic tenet since the Middle Ages. He said that he was raised as a Roman Catholic in Europe; that in his home the family kneeled and prayed in front of a creche which had been blessed by a priest; and that he had been taught to consider the scene to be sacred.

A retired Baptist minister testified to the importance of separation of church and state in Baptist polity, remembering that Baptist colonists had experienced persecution, and that Roger Williams had established the Providence Plantation for religious freedom through such separation. The minister said that Baptists see the

Nativity Scene as a religious symbol and that there was no other way to interpret it. In his opinion, Jesus Christ could not be compared to anybody else in the world.

The Mayor of Denver was called as a witness by the plaintiff. He testified that the Christmas display at the City and County of Denver Building had always been paid for through funds appropriated in the budgetary process and that the purpose was to induce people to come into downtown Denver to spend money with merchants. He also stressed the importance of the long-standing tradition which he believed constituted good public relations for the image of the City and that the Nativity Scene demonstrated the historical origin of Christmas. The creche has religious

significance for the Mayor personally and he expressed the hope that it would have such significance for others. He said that he had no opinion as to what it might mean to persons who do not have a religious belief in Jesus Christ.

It is important to recognize the limits of the issue which is now before this court. In this case, no one has challenged the observance of Christmas as a national holiday; no one has claimed that Denver must not maintain the tradition of the annual lighting display; no one has attacked the tenets of any religious beliefs; no one has sought to prevent or limit the use of the Nativity Scene or any other religious symbols in churches, homes, or on any private property; and no one has sought to secu-

larize our socity. Those who appear for the plaintiff here recognize the importance of religion in our national history, and the American Civil Liberties Union has always strongly supported the freedom to exercise religious beliefs without regard for their popularity.

What is being asserted in this case is the danger to that freedom resulting from any encroachment of the power of government into the pulpit. The Supreme Court and the lower courts of the United States have long struggled with the tensions between the establishment and free exercise clauses of the First Amendment in a wide variety of factual circumstances. The natural tendency toward attempting to resolve these questions by reasoning from first principles and Framers' intent beco-

mes increasingly attenuated as government grows more intrusive and the social order becomes more complex and pluralistic. It is difficult to imagine James Madison anticipating that municipal officials would use public funds on a religious display for the purpose of enticing people to come into a commercial area and spend their money with private merchants.

Where there is less consensus on cultural values, including religious percepts, there is greater need for restraint in the use of the coercive power of the plurality in the exercise of authority by those who obtain governmental office by popular election. There are no differences in degree of the denial of constitutionally protected liberties and no governmental act can be approved on the

ground that it is only a little bit unconstitutional.

The First Amendment provides that: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." These principles have been incorporated by judicial decision into the Fourteenth Amendment due process clause, and are fully applicable to state as well as federal action. Cantwell v. Connecticut, 310 U.S. 296 (1940); Everson v. Board of Education, 330 U.S. 1 (1947).

As the Tenth Circuit Court of Appeals has noted, the Supreme Court has "treated the Establishment and Free Exercise Clauses under various factual situations with perplexing diversity of views." Anderson v. Salt Lake City Corp., 475

F.2d 29, 31 (1973). This difficulty in interpreting the amendment results from the fact that "[t]he sweep of the absolute prohibitions in the Religion Clauses may have been calculated; but the purpose was to state an objective, not to write a statute." Walz v. Tax Commission, 397 U.S. 664, 668 (1970). While that objective must be identified in the context of a world far different from that of the Framers, its roots lie in the historical perceptions that "both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere," McCollum v. Board of Education, 333 U.S. 203, 212 (1948), but that "a union of government and religion tends to destroy government and degrade religion." Engel v. Vitale, 370 U.S. 421, 431 (1962).

With these lessons in mind, the Supreme Court has held that:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.... No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.

Everson v. Board of Education, 330 U.S. at 15-16. Moreover, while recognizing that they "are no more than helpful signposts",

Hunt v. McNair, 413 U.S. 734, 741 (1973), the Court has posited three tests to determine when government action escapes the prohibitions of the establishment clause:

> First, the [action] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion ..., finally, the [action] must not foster "an excessive government entanglement with religion".

Lemon v. Kurtzman, 403 U.S. 602, 612-613 (1971).

In determining whether the "principal or primary effect" of particular government action advances or inhibits religion, the courts are not required to parse one "primary" effect of a given activity from

its other effects and analyze only the former. In Committee For Public Education v. Nyquist, 413 U.S. 756, 783-784, n.39 (1973), the Supreme Court held:

> We do not think that such metaphysical judgments are either possible or necessary. Our cases simply do not support the notion that a law found to have a "primary" effect to promote some legitimate end under the State's police power is immune from further examination to ascertain whether it also has the direct and immediate effect of advancing religion. ... Any remaining question about the contours of the "effect" criterion were resolved by the Court's decision in Tilton,

> in which the plurality found that the mere possibility that a federally financed structure might be used for religious purposes 20 years hence was constitutionally unacceptable because the grant might "in part have the effect of advancing religion."

Rather, the Court indicated that benefits conferred upon religious institutions must be "indirect", "remote" or "incidental". Id. at 771. As Professor Tribe has noted, "[t]his shift is significant, for the remote-indirect-and-incidental standard plainly compels a more searching inquiry, and comes closer to the absolutist no-aid approach to the establishment clause than the primary effect test did." Tribe, American Constitutional Law, 840 (1978).

The City has argued that its purpose in including the creche in the Christmas Display is sufficiently secular, in that the entire display is designed to draw tourists and residents alike into the downtown business district, and to improve the City's national image. This contention is troublesome, not only in light of the Mayor's expressed hope (but not "intent") that viewers would see religious significance, but because it fails to explain the importance of the creche itself to such a commercial purpose. If the City's intent is indeed to use an appeal to sectarian religious sentiments to attract people into the city, that purpose might well be constitutionally impermissible. It is not necessary to inquire further into the City's purpose, however,

for an analysis of the "effects" and "entanglement" establishment clause tests is dispositive of this case.

While the indisputably religious nature of the creche is not in itself determinative as to whether its inclusion "advances or inhibits religion", it is highly significant. For whatever may be the governmental purpose behind inclusion of the creche, it is the symbolic nature of that act, as publicly perceived, which may have an advancing or inhibiting effect. See, discussion by Tribe, supra, at 843-844, of the importance of symbolical impact in the Supreme Court's establishment clause cases.

The convincing and uncontroverted evidence presented to this court was that the City's placement of the Nativity Scene on

the front steps of the City and County Building (the very building to which the citizens must turn for government) is widely viewed as an affirmation and support of the tenets of the Christian faith. On this issue there could be no more persuasive evidence than the letters and petitions sent to the Mayor of Denver when the requests for removal were made in 1978, and this year. They are in evidence as Plaintiff's Exhibit 3. Consider these quotations from those letters:

> God and Christ in our lives has always been what America is all about . . .
>
> It seems to me that if we are a Christian nation that we should do something to demonstrate that fact.

. . . as a good Christian Mayor.

. . . Christmas is a Christian holiday.

. . . upholding the symbolism of the religious majority.

Our country was founded on God; if she [Madalyn Murray O'Hair] doesn't like our religious beliefs she's free to go to another country.

. . . God being always the head of our nation.

This country was founded on Christianity so why allow some non-Christian to dictate to the majority, and allow the infiltration of such ideas to occur in our country.

> . . . in God we trust is our land's freedom of belief. Its because of our Christian beliefs our Country has maintained its freedom.
>
> We cannot deny our religious heritage and I think the government can reflect the majority's opinion.
>
> We as taxpayers have a right to express to the people that we are Christians . . .
>
> America was founded on Christianity and freedom of religion . . .

Certainly the people writing those letters perceive the Nativity Scene in the Denver display as a religious symbol and

an affirmation of their sincere religious beliefs. They are representative of the sentiments expressed by the hundreds of others whose strong convictions moved them to write letters and the thousands who signed the petitions.

Because the decision to include the creche in the 1979 display was made with awareness of this public sentiment, it is somewhat difficult to accept the view that the city officials' intent is only to further commercial interests in downtown Denver.

The convincing expressions by various witnesses of their feelings of "discomfort", "anger", "fear" and "being left out" upon viewing the scene, coupled with the expert testimony of the psychologist as to the effects upon minorities of sym-

bolic governmental allignment with the majority, strongly suggest that the Nativity Scene may well have the effect also of inhibiting religious beliefs (non-beliefs) of viewers.

These advancing and inhibiting effects are far from being "remote, indirect or incidental". Indeed, the evidence suggests that whatever commercial and public relations benefits derive from inclusion of the creche in the Christmas Display, they are themselves incidental to the "principal or primary" religious effect which it has on viewers. At any rate, the proven depth of response clearly establishes that the City Hall display of the Nativity Scene is publicly perceived as a religious symbol within the definition of the defendant's expert witness and

that compels the conclusion that the governmental actions of erecting, maintaining and displaying that symbol on public property at public expense is violative of the protection of minority views provided by the establishment clause of the First Amendment.

The mere fact that the rest of the Christmas display is secular, and so recognized, does not mitigate this constitutionally objectionable result. The Supreme Court has recognized that "[a]id normally may be thought to have a primary effect of advancing religion. . .when it funds a specifically religious activity in an otherwise substantially secular setting." Hunt v. McNair, 413 U.S. 734, 743 (1973). Indeed, one of the most important inquiries in application of the "effect"

test has been whether the secular and religious aspects of the challenged activity were sufficiently separable. See, Roemer v. Board of Public Works, 426 U.S. 736 (1976), (Blackmun, J., for plurality at 755; White, J., concurring at 768); Hunt v. McNair, 413 U.S. 734 (1973). The problem created by the City's placement of the creche on the steps of the City and County Building stems largely from the fact that the secular and religious aspects of the display cannot be separated, and indeed, the latter may be intentionally presented so as to promote the former.

In Walz v. Tax Commission, 397 U.S. 664, 674 (1970), the Supreme Court stated its concern -- which has since become a separate test under the establishment

clause -- that "an excessive government entanglement with religion" be avoided. In succeeding years, this concern has resolved itself into a dual inquiry: First, government must not foster what Tribe, supra at 866, has referred to as "administrative entanglement", that is, institutional interference between church and state. In this regard, the Supreme Court has held:

> In order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority.

Lemon v. Kurtzman, 403 U.S. 602, 615 (1971).

The City government has acted in this case in a manner which many reasonably perceive to ally it officially with churches following Christian beliefs. It has provided the total design, planning, funding, space, placement and maintenance for display of an inherently religious symbol. Even if there has never been any communication or contact between the City and any religious authority, the perception of such an affiliation in the minds of the people actually creates a relationship between the two which is offensive to the Constitution.

The second strand of the "entanglement" test is that derived from the Supreme Court's concern with "continuing

political strife over aid to religion." Committee For Public Education v. Nyquist, 413 U.S. 756, 794 (1973). The Court elaborated upon this concern in Lemon v. Kurtzman, 403 U.S. 602, 622 (1971) while considering a program of public assistance to parochial schools:

> Ordinarily, political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect. ... The potential divisiveness of such conflict is a threat to the normal political process.

The Court's cases in which this "divisiveness" element of "entanglement" has played a role have involved circumstances quite similar to those engendered by the City's actions in this case. The tone and content of the letters and petitions to the Mayor contained in Plaintiff's Exhibit 3 and the testimony of the witnesses in this court are clear demonstrations of a division of the Denver community resulting from inclusion of the creche in the Christmas display. The emotional intensity which is apparent in the conflict which has brought this case to court demonstrates once again the wisdom of James Madison who expressed his fear in the famous Memorial & Remonstrance Against Religious Assessments, that government involvement with religion would "destroy

that moderation and harmony which the forbearance of our laws to intermeddle with Religion, has produced among its several sects." (Reproduced in appendix to opinion of Rutledge, J., in Everson v. Board of Education, 330 U.S. 1 (1947).)

The divisiveness caused by the City's use of the creche is, moreover, of a particularly troublesome kind, for in this case, as in Lemon, supra at 623, we are "confronted with successive and very likely permanent annual appropriations that benefit relatively few religious groups. Political fragmentation and divisiveness on religious lines are thus likely to be intensified."

Some of the letter-writers have offered to donate money to pay for the erection and maintenance of the creche in the

Christmas display to avoid the use of tax revenues for that purpose. While the use of public funds is one of the elements involved in the question of entanglement, the elimination of such support is not, in itself, determinative. If the response to this decision is an attempt to replace public with private support, and so to come within the free exercise clause of the First Amendment, care must be taken to comply with those principles of neutrality mandated by the establishment and equal protection clauses of the Constitution and set forth in O'Hair v. Andrus, No. 79-2170 (D.C. Cir., filed October 5, 1979).

Just as the defendant has relied on only one expert witness to support its position, it has presented only one case which it claims to have precedential

value, Anderson v. Salt Lake City Corp., 475 F.2d 29 (10th Cir. 1973). There, the Salt Lake City and Salt Lake County Boards of Commissioners had "informally permitted" the Fraternal Order of Eagles to erect a granite monument on city and county courthouse grounds. The monolith was inscribed with the Ten Commandments and other symmandated by the establishment and equal protection clauses of the Constitution and set forth in O'Hair v. Andrus, No. 79-2170 (D.C. Cir., filed October 5, 1979).

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Salt Lake City and Salt Lake County Boards of Commissioners had "informally permitted" the Fraternal Order of Eagles to erect a granite monument on city and county courthouse grounds. The monolith was inscribed with the Ten Commandments and other symbols, including the "all Seeing Eye of God", the Star of David, letters from the Hebraic alphabet, "Christ's Monogram" (a letter "P" superimposed on the letter "X"), and the "Order of Eagles". The installation and maintenance of lighting equipment to illuminate and enhance the display were authorized at public expense.

The court found that the Ten Commandments or "Decalogue" "has substantial secular attributes", is "an affirmation of at least a precedent legal code", and con-

tains "accepted precepts, as a foundation for law". Moreover, it stressed the fact that the Order of Eagles is not a religious organization and concluded that "the monolith is primarily secular, and not religious in character; that neither its purpose or effect tends to establish religious belief." Id. at 33-34.

The facts and circumstances comprising this case are strikingly different from those presented in Anderson. Here, the City itself has taken sole responsibility for purchasing, erecting and displaying the creche. Thus, while it was clear in Anderson that the Eagles had erected the monument, this crucial symbolic element requires a different result here. Additionally, the monument in Anderson contained a variety of religious and non-

religious symbols, all related to the theme of law and justice appropriate to the courthouse setting. This case, however, involves a religious symbol central to the beliefs held by those in a group of organized religious institutions. It must be remembered that "the narrowness of the benefitted class" is an important element in assessing offensiveness under the establishment clause. Committee For Public Education v. Nyquist, 413 U.S. 756, 794 (1973). Moreover, the court in Anderson found that the symbol which was the focus of the controversy -- The Decalogue -- had significantly secular impact.. No such finding could reasonably be made with respect to the Nativity Scene.

There are additional reasons, more-

over, for rejecting the defendant's argument that Anderson is controlling in this case. Since the decision in Anderson, the Supreme Court has made it clear that government action may be unconstitutional even if it has secular effects which may be deemed "primary". See, discussion of this development supra, and Nyquist, supra, 413 U.S. at 783-784 n.39. This court has found that however the religious effects of the creche may be characterized in terms of quantitative primacy, they are certainly not "remote, indirect or incidental", and the Constitution is thus violated. Finally, the Circuit's analysis in Anderson did not include consideration of the recently developed "entanglement" inquiry discussed above, and the record there does not indicate what importance

such factors might have had in the court's decision. At any rate, consideration of the "excessive governmental entanglement" in religious affairs caused by inclusion of the creche requires its removal in this case. For a recent decision involving a more closely analogous, though still distinguishable factual context, see, Allen v. Morton, 495 F.2d 65 (D.C. Cir. 1973).

Upon the foregoing, which shall constitute the findings of fact and conclusions of law herein, it is now

ORDERED, that the defendant City and County of Denver is enjoined from the inclusion of the Nativity Scene in the Christmas display at the City and County Building, and it is

FURTHER ORDERED, that the Nativity

Scene which now stands on the front steps of that building shall be removed therefrom within forty-eight hours, and it is

FURTHER ORDERED, that the plaintiff shall have and recover from the defendant, a judgment for costs and attorney's fees in an amount to be determined after the filing of an appropriate written claim for such costs and fees within thirty days from the date of this order, and it is

FURTHER ORDERED, that the injunction hereby ordered and the claim for costs and attorney's fees shall be considered to be separate claims within the meaning of Rule 54(b) of the Federal Rules of Civil Procedure, and there being no just reason for delay in the entry of judgment on the order for an injunction, it is expressly directed that the Clerk of this court

shall directed that the Clerk of this court shall forthwith enter such judgment, making this order appealable immediately.

DATED: December 17, 1979.

BY THE COURT:

Richard P. Matsch, Judge
United States District Court

APPENDIX E

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 79-M-1605

CITIZENS CONCERNED FOR SEPARATION OF CHURCH AND STATE,	)
Plaintiff,	)
vs.	)
THE CITY AND COUNTY OF DENVER,	)
Defendant.	)

MEMORANDUM OPINION AND ORDER INTERPRETING MANDATE, VACATING JUDGMENT AND DIRECTING EVIDENTIARY HEARING ON JURISDICTION

MATSCH, Judge

After a full evidentiary hearing held on the plaintiff's motion for preliminary injunction and a stipulation that the case was submitted as a trial on the merits, as authorized by Rule 65(a)(2) of the Federal

Rules of Civil Procedure, I entered a Memorandum Opinion and Order on December 17, 1979, directing the entry of a judgment enjoining the City and County of Denver from the inclusion of the Nativity Scene in the Christmas display at the City and County Building in Denver, Colorado, and reserved consideration of a claim for attorney's fees and costs as a separate claim for relief. The judgment was entered on December 17, 1979, with a determination that there was no just reason for delay in entering final judgment on the claim for injunction under Rule 54(b) of the Federal Rules of Civil Procedure. Notice of Appeal was filed on December 18, 1979, and the United States Court of Appeals for the Tenth Circuit entered a stay of judgment on December 18, 1979.

Plaintiff's counsel proceeded to file a claim for costs and attorney's fees and the defendant sought a stay of that determination, pending determination of the appeal.

On September 4, 1980, the Tenth Circuit Court of Appeals filed its opinion that the appeal must be dismissed because the record did not show that jurisdiction had been established. Specifically, the appellate court said:

> We hold that this appeal must be dismissed on the ground that the party-plaintiff, appellee here, Citizens, has failed to establish on the record that any constitutionally protected interest of it or its members has been abridged by the challenged display of the Nativity Scene...

> Thus, in light of the absence of any evidence of standing, we are compelled to exercise judicial restraint in declining to speculate on the standing issue.

Because of that lack of evidence in the record, the court concluded as follows:

> In light of our holding that we are without jurisdiction over this cause on appeal, we cannot reach the merits of the dispute involving the alleged violation of the establishment clause of the First Amendment to the United States Constitution by reason of the Nativity Scene display.
>
> The appeal is dismissed and the cause is remanded to the District

> Court with instruction to vacate the Judgment of December 17, 1979, for want of jurisdiction.

On the same day as that opinion, September 4, 1980, the Clerk of the Tenth Circuit Court of Appeals entered a Judgment as follows:

> This cause came on to be heard on the record on appeal from the United States District Court for the District of Colorado, and was argued by counsel.
>
> Upon consideration thereof, it is ordered that the appeal is dis the cause is remanded to the United States District Court for the District of Colorado with instructions to vacate the

Judgment of December 17, 1979, for want of jurisdiction.

Also, on September 4, 1980, the Clerk of the Tenth Circuit Court of Appeals sent a letter to the Clerk of this court, enclosing a certified copy of the judgment and of the opinion with the instruction that they shall constitute the mandate under Rule 41 of the Federal Rules of Appellate Procedure. That rule directs that the mandate shall issue twenty-one (21) days after the entry of Judgment "unless the time is shortened or enlarged by order." It is apparent, therefore, that such an order must have been entered. At any rate, the appeal has been dismissed and there are no further appellate procedures pending.

On October 6, 1980, the plaintiff

filed a Motion For Jurisdictional Hearing, requesting that this court grant a hearing limited to the issue of standing, in accordance with the decision of the Tenth Circuit, issued September 4, 1980. The defendant has filed a memorandum in opposition to that motion, and the question of whether this court has the jurisdiction to grant the plaintiff's motion was heard on October 14, 1980. At that hearing, the plaintiff made an offer of proof, indicating that if an opportunity is provided, the plaintiff would establish that it is a voluntary association whose members are citizens and taxpayers of the City and County of Denver who are adversely affected by the City's inclusion of a religious scene in the annual lighting display at the City and County Building

and that such evidence would clearly establish standing and jurisdiction for the case or controversy brought in this civil action. At the same hearing, the City was asked if it intended to construct a lighting display, including the Nativity Scene in a manner comparable with that shown in the evidentiary record of this case in December, 1980 and January, 1981. The response was that the City did, indeed, intend to construct such a display for this forthcoming holiday season, thereby repeating the controversy which came before this court in this case.

In Coppedge v. Clinton, 72 F.2d 531 (10th Cir. 1934) the Tenth Circuit Court of Appeals recognized that a full retrial of the merits should not be required when the issue of jurisdiction was first raised

on appeal. There, the appellate court expressly directed the trial court to hold a jurisdictional hearing on remand. That was not done in this case. However, it is most significant that while the defendant/appellant urged the Circuit Court to dismiss the action; that court in the opinion, judgment, and mandate only directed the vacation of the judgment entered in this court on December 17, 1979. Additionally, it is to be noted that the Court of Appeals made no mention of this court's action in considering the claim for plaintiff's attorney's fees as a separate claim under Rule 54(b).

The Tenth Circuit Court of Appeals noted in Estate of Whitlock v. Commissioner of Internal Revenue, 547 F.2d 506 (10th Cir. 1976), cert. denied 430

U.S. 916, in criticizing the failure of the Tax Court to comply with a mandate, that the opinion of the appellate court may be consulted to determine the intent of its mandate and that if the lower court believes the mandate to be unclear, it can make a decision reflecting its understanding of that mandate.

It is in that spirit that I now conclude that this court does have the authority to proceed in the manner requested by the plaintiff. In determining to grant the plaintiff's motion, I am acting in an acute awareness of the public interest whown in the previous proceedings in this case and the divisive effect it has had. The record of the trial shows the intensity of emotion involved, and, I can personally attest to the sharp devi-

sion in public response to the memorandum opinion which I entered last December. It would seem most unfortunate if it became necessary to replicate all of that in another holiday season, only because of an error in the assumption that the plaintiff's standing to bring this case was not contested.

Upon the finding and conclusion that this court has not been directed to dismiss this action and that it has jurisdiction to determine standing and, therefore, to determine whether a justiciable case or controversy was before this court at the time of the hearing on December 12, 1979, it is

ORDERED, that the judgment entered in this court on December 17, 1979 is vacated, and it is

FURTHER ORDERED, that plaintiff's Motion For Jurisdictional Hearing is granted and a hearing on jurisdictional is set for October 24, 1980 at 1:30 p.m.

Dated: _____

BY THE COURT:

_____
Richard P. Matsch,
Judge
United States
District Court

APPENDIX F

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 80-DW-1661

CITIZENS CONCERNED FOR SEPARATION OF CHURCH AND STATE,	)	
Plaintiff,	)	
-vs-	)	MEMORANDUM DECISION AND ORDER
THE CITY AND COUNTY OF DENVER,	)	
Defendant.	)	

Counsel for Plaintiff:

Jonathon B. Chase, American Civil Liberties Union Foundation of Colorado, Inc., Boulder, Colorado and Daniel H. Israel of Dechert, Price & Rhodes, Denver, Colorado.

Counsel for Defendant:

Stan M. Sharoff and Darlene M. Ebert, Assistant City Attorneys, Denver, Colorado.

Filed:

This is a civil action in which Citizens Concerned for Separation of Church and State (Citizens), an unincorporated association, seeks a declaratory judgment and a preliminary and permanent injunction to enjoin the City and County of Denver (City) from displaying, storing, and appropriating public funds for a nativity scene which is part of the City and County of Denver's Annual Christmas Lighting Program. The claim arises under 42 U.S.C. § 1983 and jurisdiction is based on 28 U.S.C. § 1343(3). The plaintiff asserts that the presence of the creche on the steps of the City and County Building violates the Establishment Clause of the First Amendment.

A nearly identical case was filed in

this court on November 28, 1979. Following a hearing on plaintiff's motion for a preliminary injunction, the matter was consolidated with a trial on the merits. Fed. R. Civ. P. 65(a)(2). Judge Richard P. Matsch ruled in favor of the plaintiff and enjoined the defendant from including the nativity scene in its Christmas lighting display. 481 F. Supp. 522 (D. Colo. 1979). On appeal, the Tenth Circuit Court of Appeals held that it was without jurisdiction to hear the case because plaintiff had failed to prove it had the requisite standing to seek relief. The appeal was dismissed and the cause remanded to the district court with instructions to vacate its judgment. 628 F.2d 1289 (10th Cir. 1980).

The present action was filed on

December 2, 1980. The hearing on plaintiff's motion for a preliminary injunction was held on January 12 and 13, 1981. Unlike the earlier case, the parties did not stipulate to a consolidation with a hearing on the merits. However, they did stipulate that certain testimony and exhibits from the earlier case could be used as evidence in the present case. Inasmuch as the background facts of this case have been adequately set out in the published opinions of the district court and court of appeals in the earlier case, only those additional facts pertaining specifically to this case will be discussed in this opinion.

In the Tenth Circuit's decision, the court pointed out that the defect in standing was not one of pleading, but

rather one of proof. Plaintiff failed to present any evidence, direct or circumstantial, relative to its organizational status, structure, purpose or relationship to or with any person or persons. Witnesses called by Citizens did not testify relative to Citizens or their associational relationship thereto. Furthermore, no witness testified that he or she was a taxpayer of the City and County of Denver of the State of Colorado. To be sure, the witnesses did testify to matters going to the merits of the First Amendment claims.

628 F.2d at 1298.

At the hearing in this case, plaintiff

called one of its members who testified that Citizens was an unincorporated association of five members, each of whom had submitted an affidavit in support of the motion for a preliminary injunction. Citizens has no charter, no bylaws, no membership dues, no treasury, no property, no formal structure, and pays no taxes. It meets whenever its members want to and had met four times in the six months prior to the hearing. The purpose of Citizens is to prevent the City and County of Denver from including a nativity scene as part of its annual lighting display at the City and County Building. At least one of its members pays property tax and one or more pay gas tax, sales tax, and occupational tax to the City and County of Denver.

Plaintiff did present evidence to show its organization and purpose. In addition, the evidence showed that members of Citizens pay taxes that go to erect, maintain, and store the City's lighting display which includes the creche. Although this evidence was not impressive, the court finds that it is sufficient to establish that plaintiff has the requisite standing to bring this case.

In approaching cases dealing with the relationship between religion and government under the First Amendment, the Supreme Court has announced a three-part test for determining whether governmental activity is permissible under the Establishment Clause:

> First, the [action] must have a secular legislative purpose;

> second, its principal or primary effect must be one that neither advances nor inhibits religion ...; finally, the [action] must not foster "an excessive government entanglement with religion."

Lemon v. Kurtzman, 403 U.S. 602, 612-613 (1971).

I. Purpose

Citizens contends that because the nativity scene is a religious symbol, its inclusion in the City's lighting display must be for a religious purpose. See Stone v. Graham, 101 S. Ct. 192 (1980); Hall v. Bradshaw, 630 F.2d 1018 (4th Cir. 1980). Defendant argues that the purposes of the nativity scene and the other elements that compose the lighting display are to promote goodwill and feelings of

selflessness, to enhance Denver's national reputation, and to depict the historical origins of Christmas, a national legal holiday.

Wilbur Latham, the man responsible for the lighting display and its contents, testified that he included the nativity scene because it was part of Christmas, just like Santa Claus and the reindeer. He stated that he attaches no religious significance to the creche and had no religious purpose for including it. Latham also testified that he placed the creche, Santa Claus, the reindeer, and Santa's workshop on the steps of the City and County Building because it was less costly and required less protective fencing.

A city council member who is also the

chairman of the City's budget and finance committee described the method by which funds were appropriated for the lighting display. The city council is presented with a budget that includes the lighting display as a part of the mayor's current events. As such, the council does not vote specifically on the lighting display or the elements that compose it. The city council member testified that it was not his intent or purpose to advance Christianity by approving the budget that included the lighting display.

Other witnesses testified to the secular purpose of including the nativity scene in the City's lighting display. A doctoral student in folklore and folklife testified that the nativity scene is a common item of American folklore. She

noted that, among its contemporary uses, the nativity scene is displayed on Christmas cards and as paintings on store windows. She also testified that the use of the nativity scene is becoming increasingly secularized. A historian testified that as early as 1947 there is evidence that the nativity scene was central to the artistic plan of the City's lighting display. He stated that the inclusion of the creche in the lighting display was a Denver tradition. The historian also testified that Denver's lighting display had received favorable publicity in national magazines and had also been used on post cards.

In another nativity scene case, the Court of Appeals for the District of Columbia considered whether the inclusion

of a creche in the Christmas Pageant of Peace violated the First Amendment. Allen v. Hickel, 424 F.2d 944 (D.C. Cir. 1970). The court noted that the government "may depict objects with spiritual content, but it may not promote or give its stamp of approval to such spiritual content." In discussing the purpose of the creche, the court reviewed the language in a pageant pamphlet that "the creche was intended to be simply one of a group of objects assembled to show how the American people celebrate the holiday season surrounding Christmas." As such, the court found its purpose no more objectionable than that purpose no more objectionable than that of a postage stamp bearing a reproduction of a religious painting or a government-sponsored museum display illustrating various

religions or holiday customs.

Similarly, in Florey v. Sioux Falls School District, 619 F.2d 1311 (8th Cir. 1980), cert. denied, 49 U.S.L.W. 3351, a public school board's rules were held not to violate the First Amendment. These rules allowed observance of holidays having both religious and secular bases through programs containing music, art, literature, and drama having religious themes and through temporary display of religious symbols associated with religious holidays. In considering the purpose of the rules, the court viewed the thrust of them to be "the advancement of the students' knowledge of society's cultural and religious heritage, as well as the provision of an opportunity for students to perform a full range of music,

poetry and drama that is likely to be of interest to the students and their audience." The court explained that even if the school board desired to observe the religious basis of holidays, the Constitution did not necessarily forbid the use of materials that have a "religious basis." "Government involvement in an activity of unquestionably religious origin does not contravene the Establishment Clause if its 'present purpose and effect' is secular." 619 F.2d at 1315.

The court finds that the present factual situation is more like Allen and Florey than Stone v. Graham and Hall v. Bradshaw. As in Allen, the nativity scene here was "intended to be simply one of a group of objects assembled to show how the American people celebrate the holiday

season surrounding Christmas." 424 F.2d at 949. The evidence does not establish that the defendant promoted or gave its stamp of approval to the religious content of the creche. The teaching of both Allen and Florey is that a religious symbol can be used if there is a secular purpose. The purpose of a challenged display can only be discerned by considering the entire display and the context in which it is presented.

Stone and Hall are not to the contrary. In Stone, the Supreme Court struck down a Kentucky statute that required the posting of a copy of the Ten Commandments on the wall of every public classroom in the state. The court found that the statute violated the purpose part of the Lemon test because the Ten Commandments

were not integrated into the school curriculum. The Supreme Court has more closely scrutinized claimed Establishment Clause violations in a school setting than in a public setting. The Tenth Circuit has also recognized this when it ruled that a monolith on a courthouse grounds on which the Ten Commandments were inscribed did not violate the Establishment Clause. Anderson v. Salt Lake City Corp., 475 F.2d 29 (10th Cir. 1973). In Hall v. Bradshaw, the court enjoined a state agency from including a "motorist's prayer" on a state map that the agency published and distributed free of charge. Relying on Supreme Court prayer cases, the court stated that it was not the business of government to compose official prayers. But see Bogen v. Doty, 598 F.2d 1110 (8th Cir. 1979)

(upholding county board practice of having a prayer by local unpaid clergymen prior to the commencement of each board meeting). The court regards the facts in Hall as being much more supportive of an Establishment Clause violation than those in the instant case.

II. Effect

In determining whether the City's inclusion of a nativity scene in its lighting display has a principal or primary effect that advances or inhibits religion, the court once again must consider the nativity scene as an integral part of the City's lighting display and not in isolation. Allen v. Morton, 495 F.2d 65, 74 (D.C. Cir. 1973)(Tamm, J.); Fox v. City of Los Angeles, 22 Cal.3d 792, 587 P.2d 663, 150 Cal. Rptr. 867 (1978)(Bird, C.J., con-

curring). When viewed in the context of the lighting display and the Christmas season, the question for the court is "not whether there is any religious effect at all, but rather whether that effect, if present, is substantial." Allen v. Hickel, 424 F.2d at 949.

The nativity scene is only one of many components in the City's block-long lighting display. It is placed on the steps of the City and County Building next to Santa Claus, the reindeer and sleigh, and Santa's workshop. The figures that compose the nativity scene are of a similar size to Santa Claus and the reindeer. From a distance or at night, the creche is hardly distinguishable. This display is lit during the annual Christmas holiday season. The lights are turned off after

New Year's Day and turned on again in mid-January for the ten days of the National Western Stock Show.

The court observes as did the district court in Allen v. Morton, 333 F. Supp. 1088 (D.D.C. 1971), that Christmas is celebrated as a national holiday and the components of the City's lighting display are all related to the traditional celebration of Christmas. The nativity scene is one of these components. As a symbol of Christmas it appears repeatedly in a secular setting. "It is seen in department stores, commercial establishments as well as in public places to symbolize the celebration of Christmas, a national holiday." Id. at 1093.

Citizens argues that the City's inclusion of the nativity scene is viewed as

the City's endorsement of the religious content of the nativity scene. In support of this theory, Citizens called witnesses who testified that they viewed the nativity scene in front of the City and County Building as the City's endorsement of Christianity. Citizens also introduced several packets of letters and petitions to the Mayor of Denver opposing removal of the nativity scene. It is contended that the letters and petitions are persuasive evidence of the widely held public perception that the City is endorsing Christianity by including the nativity scene in its lighting display.

The City presented evidence that showed the nativity scene is a traditional symbol of Christmas that appears in many secular settings. Although the nativity

scene is of religious origin, it has "acquired a significance which is no longer confined to the religious sphere of life." Florey v. Sioux Falls School District, 619 F.2d at 1316. Like the materials related to Christmas and other holidays in Florey, and as discussed by the doctoral student in folklore, the nativity scene has become integrated into our culture and heritage. When viewed in the context of the entire lighting display and the evidence presented as to the use of the nativity scene in secular settings, the court cannot accept plaintiff's argument that because the creche is on the steps of the City and County Building, the City has given its approval to the contents of the creche.

It is the opinion of the court that

little weight should be given to the letters and petitions which were admitted into evidence over the City's objection and with some reluctance by the court. They were admitted for the limited purpose of establishing that the City was on notice that various persons perceived the creche as a religious symbol. As hearsay, they were not admitted to prove the truth of the matters asserted in them. Given this limited purpose, it would be improper to consider them as evidence that the authors and signatories of these writings desired the retention of the creche for religious reasons. Without having the benefit of their testimony, subject to cross-examination, the court would be speculating as to what actually motivated these persons to write or to sign the

petitions. As a matter of fact, few, if any, witnesses who testified that they wanted it left in the lighting display for religious reasons or perceived that its inclusion in the display was religiously motivated.

Two psychologists called by Citizens testified that the nativity scene would have an adverse impact on children of minority religions who viewed the scene. One psychologist was of the opinion that the creche would encourage prejudice against these children and also encourage them to deny their beliefs. She noted that it would also have an unfavorable impact on their self-esteem. This psychologist testified that the impact on children of minority religions would be greater if the nativity scene were on

public property rather than on private property. Both psychologists based their opinions on general studies and majority-minority group literature. One of them also based her opinion on some clinical experience. Both of these psychologists acknowledged that they were unaware of any literature or studies which specifically dealt with what effect the viewing of nativity scenes or other religious symbols might have upon children.

The psychologist called by the City refuted the testimony of plaintiff's psychologists and effectively so in the opinion of the court. He stated that there has been no research or studies that would support the theory of plaintiff's psychologists and that the studies and literature they relied on did not have applica-

tion to the facts of this case. He testified that the nativity scene in question is neutral and that, in viewing it, children as well as all persons, would bring to it their own meaning. He also attached no increased significance to the viewer in seeing it on government, rather than private, property. He also testified that it would be mere speculation to give an opinion as to what the effect would be upon a viewer, including a child, unless the expert had the benefit of a study dealing with nativity scenes or at least, religious symbols.

Other of plaintiff's witnesses testified that they felt angry and fearful when viewing the City's nativity scene. Some of these witnesses stated that they also get angry with "In God We Trust" on coins

and references to God in public ceremonies. Other witnesses, including theological experts, stated that the City's display of the nativity scene was blasphemous. Some testified that it cheapened what the symbol stands for. These witnesses who testified to the profanatory effect of the nativity scene underscored the secular quality of the City's lighting display. Allen v. Morton, 333 F. Supp. at 1093. No witness testified that he was more a Christian or less an atheist because of the City's lighting display.

Based upon the evidence presented at the hearing and the stipulated transcript of the earlier trial, the court finds that the inclusion of the nativity scene in the context of the other objects of the

lighting display does not have a primary effect that advances or inhibits religion.

III. Entanglement

Citizens argues that the City's placement of the nativity scene in its lighting display creates an excessive government entanglement with religion. The Supreme Court decisions cited by Citizens in support of the entanglement test deal with governmental aid to sectarian institutions, not with factual situations similar to that of the present case. In the parochial aid cases, the Supreme Court has examined four factors to determine whether government entanglement with religion is excessive: (1) the character and purposes of the institutions that are benefited, (2) the nature of the aid that the government provides, (3) the resulting

relationship between the government and the religious authority, and (4) the divisive political potential of the government aid. Lemon v. Kurtzman, 403 U.S. 602, 615, 622-23 (1971).

Assuming these factors are applicable to the present case, there was no evidence to show that any religious institutions or groups were benefited by the City's nativity scene. No aid was given and no relationship between the City and religious institutions resulted. As to alleged political divisiveness, the court observes that in light of the secular purpose of the total display and a non-religious primary effect, no religious group or groups are being benefited and divisiveness on religious lines is not likely to be intensified.

In conclusion, a quotation from

Justice Douglas is applicable. In Zorach v. Clauson, 343 U.S. 306 (1952), he discussed the hostility that could result in church and state relations if a common sense approach were not used.

> The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise the state and religion would be aliens to each other--hostile, suspicious, and even unfriendly. Churches could not be required to pay even pro-

perty taxes. Municipalities would not be permitted to render police or fire protection to religious groups. Policemen who helped parishioners into their places of worship would violate the Constitution. Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; "so help me God" in our courtroom oaths--these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment. A fastidious atheist or agnostic could even object to

> the supplication with which the Court opens each session: "God save the United States and this Honorable Court."

343 U.S. at 312-13.

Fastidiousness or overzealous rigidity has never been the test, nor should it be. While government must be sensitive to the religious beliefs or disbeliefs of its citizens, it is not required to abandon common sense. If it were determined on the evidence in this case that there was a violation of the Establishment Clause, there appears no reason why prayers in our legislative halls or "In God We Trust" on our coins would not also be unconstitutional.

Based on the foregoing, which shall constitute the findings of fact and con-

clusions of law,

IT IS ORDERED that plaintiff's motion for a preliminary injunction is denied.

Dated this 17th day of February, 1981.

/s/
David K. Winder
United States District Judge
District of Utah, sitting by designation

No. 80-1857

JUN 2 1981

ALEXANDER L. STEVAS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

CITIZENS CONCERNED FOR SEPARATION OF CHURCH AND STATE,

Petitioner,

v.

CITY AND COUNTY OF DENVER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT

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QUESTIONS PRESENTED

The Petitioner, who moved to consolidate the hearing on the merits with the hearing on the preliminary injunction pursuant to Rule 65(a)(2), Fed.R.Civ.P., failed to prove its standing to sue. On appeal to the Tenth Circuit Court of Appeals, it was held that the Petitioner's failure to prove standing deprived the district court of jurisdiction. Subsequently, after remand, the Court of Appeals prohibited the district court from holding a hearing to permit the Petitioner another chance to prove its standing. Before the Court of Appeals issued its order prohibiting the district court from entertaining another hearing, the Petitioner instituted a second lawsuit at which it proved its standing to sue. Expressed in the circumstances of this case, the questions presented are:

1. Does this Petition For Writ of Certiorari seek review of issues which are moot inasmuch as the Petitioner, at the second hearing, proved its standing to sue?

2. Did the Court of Appeals correctly rule that the Petitioner had the burden of proving its standing and that the City neither admitted Petitioner's standing nor waived its right to contest standing?

3. Did the Court of Appeals correctly rule that the Petitioner's presentation of its case was fatally flawed and not subject to rehabilitation?

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OPINIONS BELOW

There were two opinions below by the Court of Appeals for the Tenth Circuit. The first, issued September 4, 1980, remanding the cause to the district court with instructions to vacate its judgment for want of jurisdiction due to Petitioner's failure to prove its standing, is reported *sub nom. Citizens Concerned for Separation of Church and State v. City and County of Denver* at 629 F.2d 1289 (10th Cir. 1980) (Appendix A, *infra*). The second, issued December 3, 1980, prohibiting the district court from holding a jurisdictional hearing at which Petitioner sought another opportunity to prove standing, is reported *sub nom. City and County of Denver v. Matsch* at 635 F.2d 804 (10th Cir. 1980) (Appendix B, *infra*).

STATEMENT OF THE CASE

The Respondent believes Petitioner's statement is, in certain respects, inadequate and incomplete and therefore supplies this supplemental statement.

In the proceeding below which culminated in the Tenth Circuit's decision of September 4, 1980, the Petitioner, an allegedly unincorporated association, sought a preliminary and permanent injunction against the Respondent (hereinafter referred to as the "City" or "Denver") from including a nativity scene or creche in its block-long annual Christmas Lighting Display. The action was commenced, pursuant to Rule 3, Fed.R.Civ.P., by the filing of the complaint with the

court on November 28, 1979. The Defendant was not served with the summons and complaint until December 7, 1979. The summons, pursuant to Rule 12, Fed.R.Civ.P., required Denver to answer the complaint within twenty days from service and therefore an answer or responsive pleading was not due until December 27, 1979. The hearing on Petitioner's motion for a preliminary injunction was conducted on December 12, 1979, five days after service and a full fifteen days before Denver's responsive pleading was due. At the conclusion of the hearing, the Petitioner, pursuant to Rule 65(a)(2), Fed.R.Civ.P., moved for a consolidation with the hearing on the merits and the City so stipulated. The Petitioner had presented no evidence at all concerning its organizational status, structure, purpose, membership or taxpayer status. In fact, no witness testified that he or she even knew of the Petitioner association much less had membership in it.[1]

On December 17, 1979, the district court granted Petitioner's request for a permanent injunction and ordered the nativity scene dismantled within forty-eight hours. The court's decision was silent on the question of Petitioner's standing.[2]

On the following day, December 18, 1979, Denver filed a notice of appeal with the Tenth Circuit and

[1] At a hearing before the trial judge on October 14, 1980, counsel for the Petitioner candidly stated that no member of the Petitioner association was even present at the trial. Thus, Petitioner is unrealistically optimistic in asserting, as it does, that if the City had raised standing as an issue at the trial it would have been able to prove its standing.

[2] Since the court's decision did not discuss standing, it is not reproduced in the Appendix. It is reproduced as Appendix D in the Petition for Writ of Certiorari.

sought a stay of the district court's order. The stay was granted on the same day, the Tenth Circuit specifically finding that "the public interest is best served by the grant of the stay and the determination of the issues after full consideration by the Court of Appeals."

Petitioner then filed an Application For Vacation of Stay Issued By The United States Court of Appeals For The Tenth Circuit, addressed to the Honorable Byron White. Justice White referred the Application to the full Court, which denied it on January 21, 1980. Justices Brennan and Marshall dissented from the Court's denial of the application to vacate the stay. 44 U.S. 1041 (1980).

On September 4, 1980, the Court of Appeals for the Tenth Circuit, in a decision by Judge Barrett, reversed the decision of the district court, holding that the Petitioner's failure at the hearing on the motion for a preliminary injunction to introduce proof of its allegations of taxpayer standing deprived the district court of jurisdiction. The cause was remanded to the district court with instruction to vacate its judgment of December 17, 1979, for want of jurisdiction. 628 F.2d 1289 (10th Cir. 1980).

Following the decision of the Tenth Circuit, the Petitioner returned to the district court and moved the court to hold a hearing at which its standing could be established. A hearing on this motion was held on October 14, 1980. In a decision titled Memorandum Opinion And Order Interpreting Mandate, Vacating Judgment And Directing Evidentiary Hearing On Jurisdiction, dated October 14, 1980, the district court granted the Petititoner's motion for an evidentiary hearing on standing, setting the hearing for October 24, 1980. The trial court's decision is reproduced in Appendix C.

In response to the district court's ruling, the City filed a petition for writ of prohibition with the Court of Appeals on or about October 16, 1980, in which it sought an order from the Tenth Circuit prohibiting the district court from holding the jurisdictional hearing on the grounds that to do so was contrary to the mandate of the Court of Appeals in its decision of September 4, 1980. In an order dated October 22, 1980, the court stayed the district court from holding the hearing of October 24, 1980, and directed that the parties file simultaneous briefs by November 3, 1980, "directed to the issue of the power and authority of the District Court to entertain the jurisdictional hearing in light of the prior opinion of this Court" on September 4, 1980, or "whether the judgment of the District Court vacated by this Court for want of jurisdiction was rendered void thereby."

On December 2, 1980, the day before the Tenth Circuit was to rule on Denver's application for a writ of prohibition, the Petitioner filed a second action, identical to the first, seeking a preliminary and permanent injunction against Denver's inclusion of a nativity scene as part of its Christmas Lighting Display. The trial court set Petitioner's motion for a preliminary injunction for hearing on January 12 and 13, 1981.

On December 3, 1980, the Tenth Circuit granted the City's petition for writ of prohibition, holding that it was its clear intent in its decision of September 4, 1980, "to dismiss the underlying complaint and action for failure to comply with fundamental jurisdictional prerequisites." Appendix B, at p. 38.

On December 8, 1980, the Petitioner mailed to the

Court an Application For Vacation Of Order To Cease And Desist Issued By The United States Court Of Appeals For The Tenth Circuit, addressed to the Honorable Byron White. The application raised for resolution the identical issues the Petitioner now presents to the Court in the form of this Petition For Writ of Certiorari. Justice White referred the Application to the full Court which denied it on December 15, 1980, Justices Brennan, White and Stevens dissenting from the denial. 101 S.Ct. 779 (1980). On December 17, 1980, the Petitioner filed a motion for rehearing and a suggestion for rehearing *en banc* with the Tenth Circuit which was denied on January 8, 1981.

On January 12 and 13, 1981, each party presented extensive testimony at the second trial of Petitioner's motion for a preliminary injunction, some of which was directed to Petitioner's standing. On February 20, 1981, the district court ruled that Petitioner had proven its standing to maintain the lawsuit in question. However, the court denied Petitioner's motion for a preliminary injunction, finding that the inclusion of a nativity scene in a block-long Christmas display was not violative of the Establishment Clause of the First Amendment. The trial court's decision is reproduced in Appendix D.

SUMMARY OF ARGUMENT

1. The question of whether the trial court should be allowed to conduct a hearing to permit the Petitioner to prove its standing in the first action is moot because the Petitioner instituted a second action at which it proved its standing to sue.

2. The Court of Appeals correctly held that Peti-

tioner bore the burden of proving its standing and that the City neither admitted nor waived its right to contest Petitioner's standing.

3. The Court of Appeals correctly ruled that the defect in the Petitioner's case was one of proving and not pleading standing and that such a defect is fatal to the case.

ARGUMENT

1. THIS PETITION FOR WRIT OF CERTIORARI SEEKS REVIEW OF ISSUES WHICH ARE MOOT.

As previously stated, the Petitioner instituted a second lawsuit challenging the City's inclusion of a nativity scene in its annual Christmas Lighting Program. It was filed on December 2, 1980, and, to borrow the language of the Petitioner, was "identical to the first." At this second hearing, the Petitioner proved its standing to maintain the action:

> Plaintiff did present evidence to show its organization and purpose. In addition, the evidence showed that members of Citizens pay taxes that go to erect, maintain, and store the City's lighting display which includes the creche. Although this evidence was not impressive, the court finds that it is sufficient to establish that plaintiff has the requisite standing to bring this case. Appendix D, at p. 50

Thus, Petitioner's request that it be allowed to prove that it had the requisite standing at the first trial by

the invocation of a jurisdictional hearing presents a moot question for review.[3] Stated somewhat differently, it is not necessary for this Court to decide the effect of a consolidation of a preliminary injunction hearing with the hearing on the merits pursuant to Rule 65(a)(2), Fed.R.Civ.P., on a plaintiff's burden of proving his standing because Petitioner proved its standing at the second hearing.[4]

This Court has often stated that the duty of a federal court "is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Mills v. Green*, 159 U.S. 651, 653 (1895). The inability of federal courts "to review moot cases derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy." *Liner v. Jafco, Inc.*, 375 U.S. 301, 306 n.3 (1964). "Simply stated, a case is moot when the issues presented are not longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496 (1969).

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[3] Judge Doyle, in his dissent to the issuance of the writ of prohibition granted by the Tenth Circuit, also observed that the filing of the second action mooted the issue of whether a jurisdictional hearing should be held in connection with the first case. Appendix B, at p. 39.

[4] The Petitioner, it may be argued, does not really seek a resolution of the legal issues it presents in its Petition as much as it seeks to escape an adverse decision in the second lawsuit it filed. In effect, the Petitioner is attempting to resurrect what the Tenth Circuit found to be a void judgment in the first case and circumvent the result of the second preliminary injunction hearing even though Petitioner proved its standing at this later hearing.

The legal issues Petitioner desires this Court to review have been rendered moot by Petitioner's very own hand in filing a second action at which it proved its standing. The correctness of the Tenth Circuit's decision to disallow a jurisdictional hearing at which Petitioner would be allowed another opportunity to prove standing simply does not present a "live" issue for this Court's consideration.[5]

2. THE COURT OF APPEALS CORRECTLY RULED THAT THE PETITIONER HAD THE BURDEN OF PROVING ITS STANDING AND THAT THE CITY NEITHER ADMITTED NOR WAIVED ITS RIGHT TO CONTEST PETITIONER'S STANDING.

It must be stressed that standing to sue is a doctrine of constitutional limitation imposed upon federal courts by Article III of the Constitution:

> In order to satisfy Article III, the plaintiff must show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant. . . . *Simon v. Eastern Kentucky Welfare Org.*, 426 U.S. 26, 38 (1976).

Petitioner's assertion that a plaintiff "need not prove facts alleged in the complaint as the basis for jurisdiction unless these allegations are put at issue by being denied in a responsive pleading" (at 25 of its Petition) totally ignores decisions by this Court, such

[5] Petitioner seeks a decision which would most likely result in inconsistent trial court rulings — ostensibly, both binding upon the parties. One would rule unconsitutional the City's inclusion of a nativity scene in its display and the other, at least at the preliminary injunction stage, holding constitutional such a display.

as *Simon, supra,* that a plaintiff bears the burden of proving his standing. If Petitioner's view were to be adopted that a "plaintiff need not prove" his standing when litigation occurs before a responsive pleading is due, it would result in a serious weakening of the Article III, §2, limitation and constitute a major departure from prior decisions by this Court that the "plaintiff must show" or prove his standing.

The Petitioner's position that the City was required to "put at issue" the question of standing and that its failure to do so operates as an admission, is totally unsupported by decisional law. In effect, the Petitioner would allocate to a defendant the burden of producing evidence concerning a plaintiff's lack of standing before a plaintiff has produced any evidence whatsoever supporting an allegation of standing. Such an allocation of the burden of producing evidence would result in the establishment of a *prima facie* case by a plaintiff who has failed to introduce any evidence of his standing to sue and foist upon a defendant the burden of producing evidence when a plaintiff has produced none. Thus, the Petitioner's position would result in a misallocation of the burden of production of evidence. *See Texas Department of Community Affairs v. Burdine,* ____U.S.____, ____S.Ct.____, 67 L.Ed.2d 207 (1981).

The Petitioner is silent on the question of the burden a plaintiff bears in proving standing to sue. Instead, it erroneously concludes that the City "failed to meet the demands of Rule 7(a)" and that standing is therefore admitted. Petitioner's argument gives no effect to Rule 8(d), Fed.R.Civ.P., and totally ignores pre-trial facts. The district court hearing was conducted on December 12, 1979, five days after the summons and complaint was served upon the City. Rule 12,

Fed.R.Civ.P., allows a defendant twenty days to file a responsive pleading. At the time of the hearing, the City — which did not set the matter for hearing, but appeared pursuant to order — had a full fifteen days to file a responsive pleading. Rule 8(d), Fed.R.Civ.P., provides:

> [A]verments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

Thus, at the time of the hearing, the standing of the Petitioner was as much an issue as whether the challenged display violated 42 U.S.C. §1983.[6]

3. THE PETITIONER'S PRESENTATION OF ITS CASE WAS FATALLY FLAWED AND RESULTED IN A VOID JUDGMENT.

The Petitioner does not contend that it proved its standing to sue or that it even offered any evidence at all to support an inference that standing existed. What it now seeks — after the Tenth Circuit ruled against the Petitioner — is another chance to prove its case. Thus, this is not a situation — as the Tenth Circuit noted — where there was a *defect in pleadings* relating to the adequacy of allegations of standing but a *defect of proof:*

> Thus, reliance on a long line of cases, including Whitelock v. Leatherman, supra, and *Buell v. Sears, supra,* decided by this Court, which recognized that jurisdictional defects *which could be cured* by proper amendment of

[6] Moreover, the Petitioner's argument would allow a plaintiff who lacked the ability to prove standing at a trial an opportunity, after losing on appeal, to retry a case based on his newly acquired ability to prove standing. *See* f.n. 1, *supra.*

> the pleadings (technical omissions obvious in the record) should be conditionally required on remand in order to serve the interest of conservation of judicial resources, has no application here. This is so simply because there have *never been* any defects in the complaint or pleadings. The sole defect was and is in the utter failure to present *any evidence* proving its jurisdictional requisite of standing. Appendix B, at p. 35.[7]

The Tenth Circuit also noted that this Court has consistently adhered to the principle that "federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." *North Carolina v. Rice,* 404 U.S. 244, 246 (1971).

It has been recognized that even though the dismissal of a fully litigated case because of a failure to prove standing is a harsh practice, it is nevertheless constitutionally necessary:

> Again, the overturning and dismissal of a fully litigated case because the lower court lacked subject matter jurisdiction hardly comports with notions of system economy or efficiency; it can be rationalized only in terms of the importance of maintaining the principles of federalism embodied in the limited grant of power to the federal courts by Article III of the Constitution. 13 Wright & Miller, *Federal Practice and Procedure* §3522 (1975).

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[7] Thus, Rules 7(a) and 15, Fed.R.Civ.P., and 28 U.S.C. §1653, quoted in Petitioner's brief, were irrelevant to the disposition of the case by the Court of Appeals because they are concerned with amendment of pleadings.

In *Simon v. Eastern Kentucky Welfare Rights Organization, supra,* this Court, in finding the plaintiffs lacked standing to maintain their lawsuit, adhered to the constitutionally required principle that dismissal of the action is necessary:

> Accordingly, the judgment of the Court of Appeals is vacated, and the cause is remanded to the District Court with instructions to dismiss the complaint. 426 U.S. at 46.

It is apparent from the preceding authorities that the judgment of the trial court on December 17, 1979, was void and a nullity. In *V.T.A., Inc. v. Airco, Inc.,* 597 F.2d 220 (10th Cir. 1979), the Tenth Circuit, in ruling upon a Rule 60(b)(4), Fed.R.Civ.P., motion, set forth the definition of a void judgment and the consequences which flow therefrom:

> A judgment is not void merely because it is or may be erroneous. *Marshall v. Board of Education,* 575 F.2d 417, 422 (3d Cir. 1978); *Lubben v. Selective Service System Local Board No. 27,* 453 F.2d 645, 649 (1st Cir. 1972); see *Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371, 374-78, S.Ct. 317, 84 L.Ed. 329 (1940).*
>
> For a judgment to be void under Rule 60(b)(4), it must be determined that the rendering court was powerless to enter it. If found at all, voidness usually arises for lack of subject matter jurisdiction or jurisdiction over the parties. 597 F.2d at 224.

The court also noted that if a judgment is void, a federal court has only one course it can follow:

> If voidness is found, relief is not a discretionary matter; it is mandatory. *Id.*

The court's decision in *V.T.A., Inc., supra,* merely affirms the long established principle that if a federal court does not have jurisdiction over the subject matter it has no power to render a judgment:

> A judgment will not be held void on its face unless an inspection will affirmatively disclose that the court had no jurisdiction of the person, no jurisdiction of the subject matter or had no judicial power to render the particular judgment. *Clay v. Sun River Mining Co.,* 302 F.2d 599, 601 (10th Cir. 1962).

The effect of the rendition of a void judgment, as was explained in *V.T.A., Inc., supra,* is that it is a nullity:

> A void judgment is a simulated one, or one apparently rendered, where some essential element, which would authorize the court to proceed to judgment, is lacking. (Citations omitted.) 46 *Am. Jur.*2d §14.

Standing is just such an "essential element" because it is a "threshold question in every federal case, determining the power of the court to entertain the suit." *Warth v. Seldin,* 422 U.S. 490, 498 (1975).

CONCLUSION

As set forth herein, the Petition For Writ of Certiorari fails to supply any sufficient grounds or important reasons warranting review by this Honorable

Court of the judgments below within the meaning of Rule 17, Rules of the United States Supreme Court.

Therefore, the Petition For Writ of Certiorari should be denied.

Respectfully submitted,

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June 1, 1981

APPENDIX

Appendix A

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH DISTRICT

No. 79-2303

CITIZENS CONCERNED FOR SEPARATION OF CHURCH AND STATE,

Plaintiff-Appellee,

v.

THE CITY AND COUNTY OF DENVER,

Defendant-Appellant.

Appeal From the
United States District Court
For the District of Colorado
D.C. No. 79-M-1605

Jonathon B. Chase, American Civil Liberties Union Foundation of Colorado, Inc., Boulder, Colorado (Daniel H. Israel of Dechert, Price & Rhoads, Denver, Colorado, with him on the brief), for Plaintiff-Appellee.

Stan M. Sharoff, Assistant City Attorney, City of Denver, Colorado (Max P. Zall, City Attorney, Brian H. Goral and Stanley Ereckson, Jr., Assistant City Attorneys, City of Denver, Colorado, with him on the brief), for Defendant-Appellant.

Marc D. Stern, New York, New York, filed an amicus curiae brief for American Jewish Congress.

Mark W. Wolfe, Denver, Colorado, filed an amicus curiae brief for National Organization for Our American Heritage.

Before BARRETT, DOYLE and McKAY, Circuit Judges.

BARRETT, Circuit Judge.

The City and County of Denver (City) appeals from a judgment entered December 17, 1979, in favor of Citzens Concerned for Separation of Church and State (Citizens) enjoining the inclusion of the Nativity Scene in the Christmas display at the Denver City and County Building, ordering its removal within forty-eight hours, and awarding plaintiff costs and attorney's fees.

Litigative Background

This action was initiated by complaint filed November 28, 1979, by Citizens, brought by alleged but unnamed Denver residents charging violations of the Establishment Clause of the First and Fourteenth Amendments to the United States Constitution and Article Two, Section Four and Article Nine, Section Seven of the Colorado Constitution. Citizens sought declaratory judgment and preliminary and permanent injunctive relief to prevent the City from "displaying, storing, and appropriating public funds for the nativity scene (creche) in front of and within the City and County Building. The creche is part of the City and County's Christmas Lighting Program which has been conducted annually for more than eight years, and includes a Santa Claus scene and lighting display." [R., Vol. I, p. 1].

The claim was brought pursuant to 42 U.S.C.A. § 1983. The District Court's jurisdiction was alleged to have vested pursuant to 28 U.S.C.A. § 1343 (3).[1]

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[1] 28 U.S.C.A. § 1343(3) provides that the federal district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person ". . . [t]o redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

Under the caption "Parties", Citizens alleged:

PARTIES

> Plaintiff, Citizens Concerned for Separation of Church and State, is an unincorporated association, members of which are residents and taxpayers of the City and County of Denver and the State of Colorado. All have paid taxes which are used, in part, to erect, maintain, display, disassemble and store the creche. [R., Vol. I, p. 2].

The complaint was executed by Jonathon Chase, attorney for plaintiff, FOR: American Civil Liberties Union Foundation of Colorado [R., Vol. I, p. 4].

Citizens moved for entry of a preliminary injunction on December 6, 1979, pursuant to Fed. Rules Civ. Proc. rule 65(a), 28 U.S.C.A. The matter was thereafter heard on December 12, 1979, prior to the filing of any answer or other response by City. The parties presented witnesses and exhibits. At the conclusion of the evidence and arguments of counsel, the following colloquy occurred, after the presiding judge inquired of counsel for Citizens of the remedy desired and was informed that the requested remedy was the entire removal of the Nativity Scene from the Christmas display:

THE COURT: . . . If this case were to be decided with an additional opportunity for hearing or trial would the City put on anything different from what you have already put on?

MR. ERECKSON: We don't believe so, Your Honor.

THE COURT: Essentially, you have presented your case?

MR. ERECKSON: Essentially we have, Your Honor.

THE COURT: You don't feel disadvantaged in your case by doing this in a rush for Motion for Preliminary Injunction?

MR. ERECKSON: I don't believe so, Your Honor.

THE COURT: Well, I guess I can't duck out. I don't have any procedural ground, but I do believe that if I took until Monday to decide the case I wouldn't be guilty of permitting an irrevocable injury to occur between now and then, at least whether I do or don't. I am at least going to take that long to think about it.

So what I will do—take the case under advisement, and we'll resume at two o'clock on Monday. I guess that is the 17th, isn't it?

MR. ERECKSON: It is, Your Honor.

THE COURT: At which time I will rule.

MR. CHASE: Your Honor, in light of the defendant's position with respect to whether or not they would wish to put on more, I would move at this time that Rule 65(a)2, that this hearing be consolidated and be considered the trial on the merits.

THE COURT: Is that stipulated and agreed?

MR. ERECKSON: So stipulated.

THE COURT: All right, your motion is granted, and by stipulation it is granted, and the case is now standing submitted on the merits, and I'll have my ruling at two o'clock, Monday afternoon and announce it from the bench.

[R., Vol. II, pp. 155-157].

On December 17, 1979, the Court announced its ruling from the bench. The Court, both orally, and thereafter in its memorandum opinion and order filed that same day, observed that the civil action was brought "by an unincorporated association of residents and taxpayers of the City and County of Denver, Colorado, appearing through the American Civil Liberties Union". [R., Vol. III, pp. 2, 3; Vol. I, p. 14]. The Court reviewed the history of the lighting display at the City and County Building in downtown Denver, maintained for many years during the annual Christmas holiday season, and found: that it involves a spectacle of lights, stars, candles, Christmas cards, an elves' toy shop, Santa Claus, reindeer, flood lights, various tinsel, a cross, and the challenged creche or Nativity Scene; the creche, since the year 1962, has been owned and maintained by the City; the creche consists of life-size figurines of Mary, Joseph, the infant Jesus, shepherds, wise men, and domesticated animals, depicting the birth of Christ as described in the writings of St. Matthew, St. John, and St. Luke; the figurines used in the Nativity Scene were purchased by Denver with public funds in 1962; the evidence presented at trial was overwhelmingly supportive of plaintiffs' position that the Nativity Scene is a religious symbol and that by including it in the Christmas display the City and County of Denver violated the Establishment Clause of the First Amendment which is incorporated in the Fourteenth Amendment to the United States Constitution. [R., Vol. I, pp. 14-17]. The Court concluded that even though the designed total effect of the display is to turn the entire front of the City and County Building into a spectacle of light, and when viewed from a distance, the Nativity Scene is almost indiscernible, persons may also walk by the display thus creating an excessive government entanglement with religion proscribed by the First

Amendment. *Citizens Concerned, etc. v. City and County of Denver,* 481 F.Supp. 522 (D.Colo. 1979).

Appeal was taken from the District Court's judgment on December 17, 1979. On December 18, 1979, City filed a motion with this Court to stay the enforcement of the District Court's judgment pending appellate review. That motion was granted on the same day. On December 19, 1979, Citizens filed a "Petition for Rehearing and a Suggestion for Rehearing en Banc" which was denied by this Court on December 28, 1979. On December 31, 1979, Citizens applied to the United States Supreme Court to vacate the stay order granted by this Court. On January 21, 1980, the Supreme Court denied the application.

On appeal, City contends that the District Court's judgment should be reversed in that (1) the plaintiff has failed to prove its standing to litigate and obtain the relief requested, and (2) the Nativity Scene as displayed on the grounds of the City and County Building does not violate the First Amendment to the United States Constitution.

I.

City asks us to dismiss the action (and appeal) because of the failure of plaintiff to prove the requisite standing required under Article III, § 2 of the United States Constitution.

While recognizing that paragraph three (3) of the complaint alleges that plaintiff is an unincorporated association whose members are residents and taxpayers of the City and County of Denver and the State of Colorado who have paid taxes which are used in part to erect, maintain, display, disassemble, and store the

creche scene, City argues that, nevertheless, *the record is completely devoid of any evidence to establish the truth of those allegations.* [Brief of appellant, p. 10]. City points out that the record does not evidence the identity of the members of the unincorporated association, whether they are taxpayers, or where they reside. City states that "admittedly, evidence was presented at the time of the hearing on this matter from witnesses that they were residents of the City and County of Denver and State of Colorado. Yet, no evidence was submitted that these witnesses, or anyone else for that matter, were members of the plaintiff association." [Brief of appellant, p. 10].

In response to City's contention that standing has not been established, Citizens points to the allegations contained in paragraph 3 of its complaint, *supra,* and contends that City:

> " . . . does not argue, as it could not, *see Flast v. Cohen,* 392 U.S. 83 (1960), that taxpayers lack standing to raise claims of Establishment Clause violations. Defendant's position in its Brief, at 10-11, is that because plaintiff did not put on testimony at the trial to establish the truth of those factual allegations, the case must be dismissed for lack of standing. Where defendant's argument fails, however, is in the fact that defendant never denied the allegations of paragraph 3 or otherwise put the question of jurisdiction at issue. Only when the facts claimed as the basis for jurisdiction are challenged must plaintiff prove them. *KVOS, Inc. v. Associated Press,* 299 U.S. 269, 277-78 (1936); *Stern v. Beer,* 200 F.2d 794, 796 (6th Cir. 1952) ("Unless . . . challenged, the

jurisdictional question is determined by the allegations."); *see Biggs v. Public Service Coordinated Transport,* 280 F.2d 311, 314 (3d Cir. 1960).

Rule 8(d), Fed. R. Civ. P., states that the effect of a failure to deny facts alleged in the complaint is to admit them. The cases cited above make it clear that such is the case with jurisdictional facts as well. Defendant has never filed an answer in the case and by stipulating to consolidation pursuant to Rule 65(a)(2), Fed. R. Civ. P., waived the right to do so. Allegations in the Complaint not put at isue during the hearing on plaintiff's motion for a preliminary injunction must, therefore, be deemed admitted.
[Brief of Appellee, pp. 11, 12].

In its reply brief, City states that the contention that City's failure to raise the standing issue at the hearing forever bars appellate review of the issue is without merit in that the United States Supreme Court in a series of decisions, citing to *Regents of University of California v. Bakke,* 438 U.S. 265, 280-281 n. 14 (1978) (Powell, J.); *Juidice v. Vail,* 430 U.S. 327, 331 (1977); *Village of Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 260-262 (1977), has held that the standing doctrine has evolved as a doctrine of constitutional limitation on the federal judicial power found in the "case or controversy" language of Article III, § 2 of the United States Constitution which, notwithstanding that neither of the parties raised the issue, nevertheless obligates the federal courts to examine the standing of appellees as a matter of the "case or controversy" requirement asso-

ciated with Article III. [Appellant's Reply Brief, pp. 1, 2]. In further reply, City addressed Citizens' contention that City admitted the jurisdictional allegations contained in paragraph 3 of the complaint because Fed. Rules Civ. Proc. rule 8(d), 28 U.S.C.A. operates as an admission of the standing allegations inasmuch as City did not deny the allegations in a responsive pleading.

City contends that at the date of the hearing, no responsive pleading was required under rule 8(d), *supra*, inasmuch as the summons, issued pursuant to Fed. Rules Civ. Proc. rule 12, 28 U.S.C.A. required the City to answer the complaint within twenty days from service and that, accordingly, an answer was not due until December 27, 1979. City points out that the hearing from which this appeal lies was conducted on December 12, 1979, five days after service was affected and fifteen days before the City's answer was due. [Reply brief of Appellant, pp. 2, 3]. Finally, City argues that Citizens, in an attempt to compensate for its failure to prove its standing, improperly contends that City waived its right to file an answer (and, therefore, admitted the allegations of paragraph 3) by stipulating pursuant to Fed. Rules Civ. Proc. rule 65(a)(2), 28 U.S.C.A. to a consolidation of the preliminary hearing with a hearing on the merits. City states that Citizens' argument misconstrues the legal effect of the waiver because it disregards the express language of the second sentence of rule 8(d), Fed. Rules Civ. Proc., which reads "Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided."

We hold that this appeal must be dismissed on the ground that the party plaintiff, appellee here, Citizens, has failed to establish on the record that any constitutionally protected interest of it or its members has

been abridged by the challenged display of the Nativity Scene. Insofar as this record is concerned, Citizens is an unincorporated association without articles, by-laws, formal or informal charter, or any identifiable organizational structure, purpose or design. There are no averments relative to membership participation in Citizens or, for that matter, any criteria governing membership. Furthermore, the record does not identify a single person as a member of the named plaintiff, Citizens, and its witnesses at the District Court hearing were not identified either as members of Citizens or as taxpayers of the City and County of Denver and the State of Colorado.

The threshold issue, then, is whether, at the date of the District Court's order, it was vested with jurisdiction. Insofar as the record reflects, jurisdiction was assumed by the District Court.

Standing to sue, like mootness and ripeness, ". . . has its constitutional origins in the 'case or controversy' limitation of Article III which insures that courts exercise their power only in cases where true adversary context allows informed judicial resolution." *Wiley v. Nat. Collegiate Athletic Ass'n.*, 612 F.2d 473, 475 (10th Cir. 1979). *See also: Hackbart v. Cincinnati Bengals, Inc.*, 601 F.2d 516 (10th Cir. 1979), *cert. denied,* _____ U.S. _____, 100 S.Ct. 275 (1980); *Napier v. Gertrude,* 542 F.2d 825 (10th Cir. 1976), *cert. denied* 429 U.S. 1049 (1977); *Nichols v. United States,* 460 F.2d 671 (10th Cir. 1972), *cert. denied* 409 U.S. 966 (1972); Wright-Miller-Cooper, Federal Practice and Procedure, Vol: 13 and Cum. Supp., § 3531.

The question of "standing" to sue has been well stated:

The question of standing — of whether "a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy" [*Sierra Club v. Morton,* 405 U.S. 727, 731 (1972)] differs from all of the other elements of justiciability [See §§ 3-90 to 3-16, supra] by focusing primarily "on the *party* seeking to get his complaint before a federal court" and only secondarily "on the *issues* he wishes to have adjudicated." [*Flast v. Cohen,* 392 U.S. 83, 99 (1968) (emphasis added).] Standing problems are currently analyzed by the Supreme Court in terms of two inquiries: (a) "whether the [party] alleges that the challenged action has caused him *injury in fact,* economic or otherwise," and (b) "whether the interest sought to be protected by the complainant is *arguably within the zone of interests* [sought] *to be protected or regulated* by the statute or constitutional guarantee in question." [*Association of Data Processing Service Organizations v. Camp,* 397 U.S. 150, 152, 153 (emphasis added).] [Although this precise formulation was shaped to meet a challenge to administrative action of federal statutory grounds, it has become the standard formula in federal *constitutional* challenges to legislative, executive and administrative acts alike. . . .]
Tribe, *American Constitutional Law,* Standing, § 3-17, pp. 79, 80 (1978). *See also:* Davis, Administrative Law of the Seventies, Supplementing Administrative law Treatise, *Standing,* §§ 22.02-11 through 22.20 (1976 as supplemented 1980).

The direct "standing" issue presented here is whether, on the state of the record, the named plaintiff lacked standing to seek the relief obtained against the defendant on any ground advanced. Citizens lacked such standing. This is necessarily so because there is no showing of any direct, or even causal connection, between the challenged creche display constituting the alleged First Amendment constitutional violation, and any *injury in fact* to the named plaintiff, Citizens. Furthermore, the action cannot be "saved" by reliance on the "standing" of officers or members of Citizens simply because this record is barren of any identification of a single person qualifying as such. Put another way, the record does not reflect that Citizens qualifies as a litigant entitled to invoke the jurisdiction of a federal district court to decide the merits of a dispute involving alleged violations of the United States Constitution in the Article III "case or controversy" context, *Warth v. Seldin,* 422 U.S. 490 (1975), or that any facts have been proved conferring standing on its members. In *Broadrick v. Oklahoma,* 413 U.S. 601, 610-611 (1973) the Court observed that ". . . constitutional rights are personal and may not be asserted vicariously. See *McGowan v. Maryland,* 366 U.S. 420, 429-430 (1961). These principles rest on more that the fussiness of judges. They reflect the conviction that under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the nation's laws. See *Younger v. Harris,* 401 U.S. 37, 52 (1971)."

In *Duke Power Co. v. Carolina Env. Study Group, Inc.,* 438 U.S. 59 (1978), the Supreme Court recognized "injury in fact" as the one constant element in judicial statements concerning standing:

> The essence of the standing inquiry is whether the parties seeking to invoke the court's jurisdiction have "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr,* 369 U.S. 186, 204 (1962). As refined by subsequent reformulation, this requirement of a "personal stake" has come to be understood to require not only a "distinct and palpable injury", to the plaintiff, *Warth v. Seldin,* 422 U.S. 490, 501 (1975), but also a "fairly traceable causal connection between the claimed injury and the challenged conduct.
> *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 261 [97 S.Ct. 555, 561, 50 L.Ed.2d 450] (1977). 438 U.S. at p. 72, 98 S.Ct. at p. 2630.

In *Warth v. Seldin, supra,* the Supreme Court required a heavy burden of pleading in order to meet the standing requirements, i.e., that the complainant must clearly allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers.

Sierra Club v. Morton, 405 U.S. 727 (1972) involved an action by Sierra Club, a membership corporation with a "special interest in the conservation and sound maintenance of the national parks, game refuges, and forests of the country" for a declaratory judgment and an injunction to restrain federal officials from approving a ski development project in the Sequoia National Forest. The District Court granted the injunction. The

Court of Appeals reversed on the ground that the named plaintiff was without standing to litigate the issue. The Supreme Court affirmed. The Supreme Court observed that Congress may not confer jurisdiction on Article III federal courts to render advisory opinions, entertain "friendly" suits, or resolve "political questions". Where, however, a dispute is otherwise justiciable (as in the case at bar) the question of whether the litigant is the proper party to request an adjudication of a particular issue depends upon whether that litigant has established a sufficient stake in the controversy to obtain judicial resolution of the dispute.

The named plaintiff, Sierra Club, alleged that it and its members would be injured by the changes in the aesthetics and ecology of the area. The Court held that such allegations failed to invoke the jurisdiction of the federal courts because the Sierra Club did not allege that it or its members would be affected in any way in their activities or pastimes in the area as a result of the development. The Court observed:

> *But the "injury in fact" test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured.*
>
> ★ ★ ★
>
> The Club apparently regarded any allegations of individualized injury as superfluous, on the theory that this was a "public" action involving questions as to the use of natural resources, and that the Club's longstanding concern with and expertise in such matters

was sufficient to give it standing as a "representative of the public".

★ ★ ★

We noted this development (recognition of injuries other than economic harm) with approval in *Data Processing,* 397 U.S. at 154, in saying that the interest alleged to have been injured "may reflect 'aesthetic, conservational, and recreational' as well as economic values." *But broadening the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury.* [Emphasis supplied]. 405 U.S. at pp. 734, 735, 736, 738.

Thus, a party must clearly demonstrate by facts alleged that "he himself is adversely affected" or those he represents have been "injured in fact". *Sierra Club v. Morton, supra; Data Processing Service v. Camp,* 397 U.S. 150 (1970).

Parties may not by stipulation invoke judicial power of the United States in litigation which does not present an actual case or controversy, *Memphis Light, Gas & Water Division v. Craft,* 436 U.S. 1 (1978), *Sosna v. Iowa,* 419 U.S. 393 (1975), *Richardson v. Ramirez,* 418 U.S. 24 (1974), and jurisdictional questions are of primary consideration and can be raised at any time by courts on their own motion. *McGrath v. Kristensen,* 340 U.S. 162 (1950); *First State Bank, etc. v. Sand Springs State Bank,* 528 F.2d 350 (10th Cir. 1976); *Bledsoe v. Wirtz,* 384 F.2d 767 (10th Cir. 1967).

Citizens has not established standing to sue in its own right. There is no showing that the creche scene in the Christmas display will in anywise impair the functions and activities of Citizens. There is no contention that Citizens will suffer any economic loss or injury—or any other injury—as a result of the alleged First Amendment violation. Citizens has not alleged or proved that it is a person which may be adversely affected by the challenged display. Thus, it has failed to demonstrate a "personal stake" in the outcome of the controversy or, for that matter, that it is an organization deeply interested in the problem. The record is devoid of any demonstrable identification of Citizens in an organizational sense which could bring it within the realm of an "aggrieved person" suffering an invasion of a legal right. In *Sierra Club v. Morton, supra,* this was well articulated:

> The requirement that a party seeking review must allege facts showing that he is himself adversely affected does not insulate executive action from judicial review, nor does it prevent any public interests from being protected through the judicial process. It does serve as at least a rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome.
> 405 U.S. at p. 740.

The record is barren of any identification of a single member (officer or otherwise) of Citizens. Thus, there is no showing that officers or members of Citizens have that necessary "personal stake" required for demonstration of injury in fact. In terms of the "legal wrongs" or "zones of interests" tests relative to standing to sue,

there must be some articulable "cause and effect" relation to an identifiable "injury" attributable to a party litigant. A private litigant must, in order to have "standing" to sue, demonstrate a personal stake in the outcome and that he is the proper party to request adjudication of the particular issue. *Flast v. Cohen,* 392 U.S. 83 (1968). Article III courts cannot issue advisory opinions which cannot affect the rights of the parties in the case before them. *North Carolina v. Rice,* 404 U.S. 244 (1971); *Oil Workers Union v. Missouri,* 361 U.S. 363 (1960).

One of the most recent Supreme Court pronouncements on the doctrine of standing in the federal courts is *Gladstone, Realtors v. Village of Bellwood,* 441 U.S. 91 (1979). The Court there significantly observed that although standing is a matter dealt with at the earliest stages of litigation, usually on the pleadings, it sometimes remains to be seen whether the factual allegations of the complaint (sufficient if established by adequate proof) will be supported adequately by the evidence adduced at trial. The Court there reviewed important opinions relating to the status of the standing doctrine:

> The constitutional limits on standing eliminate claims in which the plaintiff has failed to make out a case or controversy between himself and the defendant. In order to satisfy Article III, the plaintiff must show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant. . . . Otherwise, the exercise of federal jurisdiction "would be gratuitous and thus inconsistent

with the Article III limitation." *Simon v. Eastern Kentucky Welfare Org., supra,* at 38.

> Even when a case falls within these constitutional boundaries, a plaintiff may still lack standing under the prudential principles by which the judiciary seeks to avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to federal courts to those litigants best suited to assert a particular claim. For example, a litigant normally must assert an injury that is peculiar to himself or to a distinct group of which he is a part, rather than one "shared in substantially equal measure by all or a large class of citizens." *Warth v. Seldin, supra,* at 499. He also must assert his own legal interests rather than those of third parties. *Ibid. Accord, Arlington Heights v. Metropolitan Housing Development Corp., supra,* at 263.
> 441 U.S. at pp. 99, 100.

During the District Court hearing in the instant case, Citizens did not present any evidence, direct or circumstantial, relative to its organizational status, structure, purpose or relationship to or with any person or persons. Witnesses called by Citizens did not testify relative to Citizens or their associational relationship thereto. Furthermore, no witness testified that he or she was a taxpayer of the City and County of Denver of the State of Colorado. To be sure, the witnesses did testify to matters going to the merits of the First Amendment claims.

Citizens relies substantially on two legal theories in

defense of the standing challenge. First, Citizens contends that paragraph 3 of its complaint contained adequate factual allegations to establish standing. In a pleading sense, we agree. However, we cannot agree with Citizens' argument that because of City's failure to object to Citizens' standing, it (Citizens) was under no obligation to present adequate proof at the District Court hearing supporting the paragraph 3 "standing" allegations. Citizens attempts to avoid this obligation on the basis that City did not deny the allegations in paragraph 3 or "otherwise put the question of jurisdiction at issue". [Brief of Appellee, p. 12]. Thus, Citizens argues that because the facts alleged in paragraph 3 were not challenged by City, they must be taken as true. Citizens relies on Fed. Rules Civ. Proc. rule 8(d), *supra,* for its authority in this regard, pointing out that the rule states that failure to deny facts alleged in the complaint, including jurisdictional facts, constitutes an admission. While recognizing that Citizens has not filed an answer (which was not due at the date of the hearing) Citizens nevertheless argues that by stipulating to consolidate the hearing on the preliminary injunction with the hearing on the permanent injunction pursuant to Fed. Rules Civ. Proc. rule 65(a)(2), *supra,* City waived its right to file an answer.

We have heretofore observed that paragraph 3 complies with the pleading requirements of Fed. Rules Civ. Proc. rule 8, *supra.* Thus, under usual and routine litigative procedure, a defendant, under the theory of Fed. Rules Civ. Proc. rule 8(b) and (d), *supra,* must file a responsive pleading, whether it be an answer or a reply, setting forth his defenses to each claim asserted in the form of admission or denials. The purpose thus served is that allegations in the complaint not denied will stand admitted and will not be at issue at trial and

those allegations denied will require proof to be established by the plaintiff in order that he prevail. Here, the answer of City was not due when the hearing on the injunctive relief sought by Citizens was held. No contention is made that City was required to file an answer or other pleading prior to the hearing. Thus, there was no statutory failure on the part of City to plead. Nor could there be, inasmuch as no responsive pleading was required at the date of the hearing on the petition for grant of a preliminary injunction. The last sentence of rule 8(d), *supra,* explicitly provides: *"Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided."* Thus, in our view, the burden of establishing all jurisdictional facts was squarely that of the petitioner, Citizens, when the District Court hearing was held.

The policies reflected in the enactment of the 1966 amendment to rule 65 [subsection (a) (2)] were designed to efficiently expedite final disposition of an injunctive action. This subsection was added to provide that a hearing on a preliminary injunction may be consolidated with one on the merits, so that any evidence introduced at a rule 65(a) hearing (for a preliminary injunction) that would be admissable at trial becomes part of the record and thus need not be repeated upon the trial. The Advisory Committee in its note to the amendment (39 F.R.D. 124, 125) states that the new subdivision "reflect[s] the substance of the best current practice and introduces no novel conception." The statements of the Advisory Committee indicate — and there is no legislative history contra — that rule 65, *supra,* with its amendments and additions was designed solely as a procedural tool to expedite the action and accommodate the court and the litigants.

Such consolidation may obviously avoid having the same evidence presented both at the preliminary injunction stage and later at trial at the permanent injunction stage. Thus, such a consolidation generally saves considerable time at trial by eliminating unnecessary evidentiary redundancy. Wright & Miller, Federal Practice and Procedure: Civil § 2950; 42 Am.Jur.2d §§ 286, 287. Of paramount significance here, however, rule 65, *supra, does not* confer either subject matter or personal jurisdiction on the court. Wright & Miller, Federal Practice and Procedure: Civil § 2941. It has been noted that the subject of injunctions in the federal courts has a three-fold aspect: (1) jurisdictional, i.e., power to entertain the action, and control of the subject matter and the parties; (2) propriety of issuing the injunction, sometimes referred to as "equitable jurisdiction", and (3) procedural, i.e., control of the issuance of an injunctive order. Rule 65, *supra,* affects only the third factor in that it determines only the method of seeking and obtaining any sort of an injunction. Accordingly, it has no relationship to or bearing on either the jurisdiction to exercise or the propriety of exercising the injunctive power. 7-Pt. 2 Moore's Federal Practice § 65.03[1]. Thus, rule 65 confers no jurisdiction. 7-pt. 2 Moore's Federal Practice § 65.03[3].

It is fundamental that mandatory injunctive relief should be granted only under compelling circumstances inasmuch as it is a harsh remedial process not favored by the courts. 42 Am.Jur.2d, Injunctions, §§ 16, 20. It is only available following a final hearing governed by hearings in equity suits generally relating to rules of evidence, reference and the Federal Rules of Civil Procedure. 27 Am.Jur.2d, Equity, §§ 235, 236. Thus, the party seeking the injunction must prove his

own case and adduce the requisite proof, by a preponderance of the evidence, of the conditions and circumstances upon which he bases the right to and necessity for injunctive relief. 42 Am.Jur.2d, Injunctions, § 287; 19 A.L.R.3d 492.

We have heretofore observed that in its brief, Citizens invoked *Flast v. Cohen, supra,* for the broad-sweeping rule that taxpayers have standing to raise claims of First Amendment Establishment Clause violations. That the rule in *Flast* is not as "sweeping" as Citizens urges, was, in our view, articulated by the Supreme Court in *United States v. Richardson,* 418 U.S. 166 (1974), where the Court observed:

> Although . . . *Flast v. Cohen, supra,* is a starting point in an examination of respondent's claim to prosecute this suit as a taxpayer, that case must be read with reference to its principal predecessor, *Frothingham v. Mellon,* 262 U.S. 447 (1923). In *Frothingham,* the injury alleged was that the congressional enactment challenged as unconstitutional would, if implemented, increase the complainant's future federal income taxes. Denying standing, the *Frothingham* court rested on the "comparatively minute [,] remote, fluctuating and uncertain," *id.,* at 487, impact on the taxpayer, and the failure to allege the kind of direct injury required for standing.
>
> > "The party who invokes the [judicial] power must be able to show not only that the statute is invalid but that he has sus-

> tained or is immediately in danger of sustaining some direct injury as a result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." *Id.*, at 488.

. . . While the "impenetrable barrier to suits against Acts of Congress brought by individuals who can assert only the interest of federal taxpayers," *id.*, at 85, has been slightly lowered, the [*Flast v. Cohen*] Court made clear it was reaffirming the principle of *Frothingham* precluding a taxpayer's use of "a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System." *Id.*, at 106.

Although the Court made it very explicit in *Flast* that a "fundamental aspect of standing" is that it focuses primarily on the *party* seeking to get his complaint before the federal court rather than "on the issues he wishes to have adjudicated" . . . [here] . . . While we can hardly dispute that this respondent has a genuine interest in the use of the funds and that his interest may be prompted by his status as a taxpayer, he has not alleged that, as a taxpayer, he is in danger of suffering any particular concrete injury as a result of the operation of this statute. As the Court noted in *Sierra Club v. Morton*, 405 U.S. 727 (1972): "[A] mere 'interest in a problem' no matter how long-standing the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to

> render the organization 'adversely affected' or 'aggrieved' within the meaning of the APA." *Id.*, at 739.
> [Footnote omitted].
> 418 U.S. at pp. 171, 172, 173, 174, 177.

See also: Wright, Law of the Federal Courts, 3d Ed., § 13 "Case or Controversy" — Standing to Litigate, pp. 42-52.

In *Penn v. San Juan Hospital, Inc.*, 528 F.2d 1181 (10th Cir. 1975), we recognized that while the object of a preliminary injunction is to preserve the status quo pending the litigation on the merits, it is distinguishable, in terms of proof, in that while (a) it is not necessary that the plaintiff establish to a certainty at a hearing on application for a temporary injunction that he is entitled to relief on the merits, but rather that his success is probable; (b) at a hearing upon consolidation pursuant to rule 65(a)(2), *supra*, for permanent injunction, the plaintiff cannot hold back evidence and must fully develop his case. We there cited to 7 J. Moore, Federal Practice, par. 65.04(4), pp. 6566-65-67. *See* 528 F.2d at p. 1187. Part and parcel of the full development of the case pursuant to a rule 65(a) (2), *supra*, hearing must necessarily involve proof that the party plaintiff is the real party in interest. *See* Fed. Rules Civ. Proc., rule 17(a), 28 U.S.C.A.; 59 Am.Jur. 2d, Parties, § 38. There is a difference between capacity to sue and standing to sue. The former relates to the right to come into court, while the latter relates to the right to relief. *See* 69 A.L.R.3d 1142. In *Boeing Airplane Company v. Perry*, 322 F.2d 589 (10th Cir. 1963), *cert. denied*, 375 U.S. 984 (1964), we said:

> Every civil action in the federal courts must, of course, be prosecuted in the name of the real party in interest. And the "real party in interest" is the one who, under applicable substantive law, has the legal right to bring the suit. See: *Hoeppner Construction Company v. United States*, 10 Cir., 287 F.2d 108. Accordingly, an administrator may bring the suit in his own name without joining the parties for whose benefit it is brought, if by the law of the forum he may do so. See: F. R. Civ. P., Rule 17(a); third sentence, Rule 17(b); Federal Practice and Procedure, Barron & Holtzoff, Ch. 8, § 486; and Moore's Federal Practice, Vol. 3, § 17.18.
> 322 F.2d at p. 591.

Thus, in light of the absence of any evidence of standing, we are compelled to exercise judicial restraint in declining to speculate on the standing issue. By focusing, as we must, on the *party* seeking relief, we observe that this record on appeal does not contain a scintilla of evidence the the plaintiff (Citizens) is within the zone of interest protected by the First Amendment or has suffered any injury in fact by reason of its violation as invoked in the complaint. *See Natural Res. Def. Coun., Inc. v. United States Env. P. Ag'cy.*, 481 F.2d 116 (10th Cir. 1973).

A federal court must in every case, and at every stage of the proceeding, satisfy itself as to its own jurisdiction, and the court is not bound by the acts or pleadings of the parties. *Treines v. Sunshine Min. Co.*, 308 U.S. 66 (1939); *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178 (1936); 12 A.L.R.2d 12; 47 A.L.R.2d 646. This obligation and duty to be watchful of the

question of jurisdiction extends full measure to the federal appellate court which must satisfy itself of its own jurisdiction and that of the district court. *Mitchell v. Maurer,* 293 U.S. 237 (1934); *Minnesota v. Hitchcock,* 185 U.S. 373 (1902). "Although raised by neither of the parties, we are first obligated to examine the standing of appellees, as a matter of the case-or-controversy requirement associated with Art. III, to seek injunctive relief in the District Court. *North Carolina v. Rice,* 404 U.S. 244 (1971); *O'Shea v. Littleton,* 414 U.S. 488, 493-498 (1974)." *Juidice v. Vail, supra,* at page 331.

II.

In light of our holding that we are without jurisdiction over this cause on appeal, we cannot reach the merits of the dispute involving the alleged violation of the Establishment Clause of the First Amendment to the United States Constitution by reason of the Nativity Scene display.

The appeal is dismissed and the cause is remanded to the District Court with instruction to vacate the judgment of December 17, 1979, for want of jurisdiction.

APPENDIX B

Before Honorable James E. Barrett, Honorable William E. Doyle, and Honorable Monroe G. McKay, Circuit Judges

THE CITY AND COUNTY OF DENVER,

Petitioner,

v.

THE HONORABLE RICHARD P. MATSCH, Judge, United States District Court

Respondent,

and CITIZENS CONCERNED FOR SEPARATION OF CHURCH AND STATE,

Real Party in Interest.

MEMORANDUM ORDER GRANTING PETITION FOR WRIT OF PROHIBITION

BARRETT, Circuit Judge:

THIS MATTER is before the Court on a Petition for Writ of Prohibition filed by the City and County of Denver seeking an order prohibiting the United States District Court for the District of Colorado and the Honorable Richard P. Matsch, presiding, from conducting further proceedings in Civil Action No. 79-M-1605, styled *Citizens Concerned for Separation of Church and State v. The City and County of Denver.*

Following the filing of the petition, this Court stayed the District Court's order of October 14, 1980, setting down Plaintiff's Motion for Jurisdictional Hearing for October 24, 1980, at 1:30 p.m. In accordance with Rule 21(b), Fed. Rules of App. Proc., 28 U.S.C., we further ordered that (a) Real Party in Interest, Citizens Concerned for Separation of Church and State, file an answer to Petition on or before October 30, 1980, at 5:00 p.m., and (b) the respective parties to this controversy file concurrent typewritten briefs directed to the power of the District Court to entertain the jurisdictional hearing in light of our prior opinion in No. 79-2303, *Citizens Concerned, Etc., v. City and Cty. of Denver,* 628 F.2d 1289 (10th Cir. 1980).

On October 30, 1980, Citizens Concerned for Separation of Church and State (hereinafter referred to as Citizens) filed its "Response", thereafter supplemented on November 3, 1980. Petitioner, The City and County of Denver (hereinafter referred to as City-County) did not file a supplemental brief on or before November 3, 1980, apparently relying on its contentions and authorities cited in its Petition for Writ of Prohibition. Respondent, Honorable Richard P. Matsch, Judge, United States District Court, has not filed an appearance. We have determined that oral arguments would not lend material assistance to the Court and, accordingly, the Petition is considered on the record, pleadings, responses and briefs.

Preliminary Background

On September 4, 1980, this Court rendered its opinion in *Citizens Concerned, Etc. v. City and Cty. of Denver, supra,* whereby, in conclusion, we stated:

In light of our holding that we are without

> jurisdiction over this cause on appeal, we cannot reach the merits of the dispute involving the alleged violation of the Establishment Clause of the First Amendment to the United States Constitution by reason of the Nativity Scene display.
>
> The appeal is dismissed and the cause is remanded to the District court with instruction to vacate the judgment of December 17, 1979, for want of jurisdiction. 628 F.2d at p. 1301.

On October 6, 1980, Citizens filed a Motion for Jurisdictional Hearing with the District Court, seeking to cure its failure to prove standing to sue at the consolidated hearing leading to this Court's opinion of September 4, 1980. On October 14, 1980, the District Court, over objection of City-County, entered its "Memorandum Opinion and Order Interpreting Mandate, Vacating Judgment and Directing Evidentiary Hearing on Jurisdiction".

The Court noted that at the October 14th hearing, Citizens '. . . made an offer of proof, indicating that if an opportunity is provided, the plaintiff would establish that it is a voluntary association whose members are citizens and taxpayers of the City and County of Denver who are adversely affected by the City's inclusion of a religious scene in the annual lighting display at the City and County Building and that such evidence would clearly establish standing and jurisdiction for the case or controversy brought in this civil action." At the same hearing, City-County was asked if it intended to construct a lighting display, including the Nativity Scene in a manner comparable with that shown in the

evidentiary record of this case in December, 1980 and January, 1981. The response was that the City-County did intend to construct such a display for this holiday season.

The Court cited to *Coppedge v. Clinton,* 72 F.2d 531 (10th Cir. 1934) for the proposition that a full retrial of the merits should not be required where the issue of jurisdiction was first raised on appeal and that a hearing on the issue should be held on remand. The District Court noted that this Court did not direct dismissal of the action, as urged by City-County, but ". . . only directed the vacation of the judgment entered in this court on December 17, 1979." The District Court further cited *Estate of Whitlock v. Commissioner of Internal Revenue,* 547 F.2d 506 (10th Cir. 1976), *cert. denied,* 430 U.S. 916 (1977), for the proposition ". . . that the opinion of the appellate court may be consulted to determine the intent of its mandate and that if the lower court believes the mandate to be unclear, it can make a decision reflecting its understanding of that mandate."

Based thereon, and while recognizing that the "acute awareness of the public interest shown in the previous proceedings in this case and the divisive effect it has had" the Court found and concluded ". . . that this Court has not been directed to dismiss the action and that it has jurisdiction to determine standing and, therefore, to determine whether a justiciable case or controversy was before this Court at the time of the hearing on December 12, 1979 . . ."

Contentions of the Parties

It is City-County's position that the Trial Court's order convening a "jurisdictional hearing" is in excess

of its authority under our mandate which ". . . granted no relief to the Respondent [Citizens] but simply remanded for the vacation of the trial court's judgment for want of jurisdiction."

Citizens contends that the District Court's decision to take evidence on standing does not constitute an abuse of discretion justifying the issuance of the Writ of Prohibition, citing to *Sierra Club v. Morton,* 405 U.S. 727, 735-736, n. 8 (1972), *Warth v. Seldin,* 422 U.S. 26, 45, n. 25 (1976), *Gladstone Realtors v. Village of Bellwood,* 444 U.S. 91, 109, n. 22 (1979), *Whitelock v. Leatherman,* 460 F.2d 507, 515 (10th Cir. 1972) and *Buell v. Sears, Roebuck and Co.,* 321 F.2d 468, 471 (10th Cir. 1963) for the proposition that "Litigants are to be given full opportunity to correct any deficiencies in allegations or proof in order to sustain their standing before the federal courts."

Our Disposition

A.

In our view, the authorities relied upon by the Trial Court and Citizens miss the mark.

Coppedge v. Clinton, supra, does not support the District Court's order. The challenge there was lack of jurisdiction for want of requisite diversity of citizenship. This Court did, to be sure, remand for trial on the jurisdictional issue only. The remand in *Coppedge,* unlike the remand in the instant case, was predicated on the use of improper legal criteria applied by the trial court. Such was not the problem in the case at bar. Jurisdiction was simply not established, although properly plead. No mistake in application of legal doctrines or criteria led to the deficiency in this case, as in *Coppedge.* There is no similarity between the two cases.

In the instant case, there is no basis in the record to support the judgment, notwithstanding the fact, as previously observed, that paragraph 3 of Citizens' complaint did, in a pleading sense, contain ". . . adequate factual allegations to establish standing." Thus, we clearly recognized that there was no deficiency in Citizens' complaint, *per se,* but that under the circumstances of the proceedings (no answer filed or required and cause submitted on a consolidation of the preliminary with the permanent injunction request as permitted under Rule 65(a) (2)) that ". . . the burden of establishing all jurisdictional facts was squarely that of the petitioner, Citizens, when the District Court hearing was held." (628 F.2d at p. 1298). We further said that ". . . at a hearing upon consolidation pursuant to rule 65(a) (2), *supra,* for permanent injunction, the plaintiff cannot hold back evidence and must fully develop his case" (628 F.2d at p. 1300) and ". . . this appeal must be dismissed on the ground that . . . Citizens, has failed to establish on the record that any constitutionally protected interest of it or its members has been abridged by the challenged display of the Nativity Scene." (628 F.2d at p. 1294).

Citizens' reliance on *Sierra Club v. Morton, supra, Warth v. Seldin, supra, Simon v. Eastern Ky. Welfare Rights Org., Supra, Gladstone Realtors v. Village of Bellwood, supra, Whitelock v. Leatherman, supra,* and *Buell v. Sears, Roebuck and Co., supra,* is misplaced. Those opinions deal with *defects in pleadings* relating to the adequacy of allegations of standing. They hold that litigants should be accorded liberal rights to amend the complaint or by other pleadings in order to cure the jurisdictional defects existing in the allegations. We have no quarrel with those decisions. They do not, however, apply to the case at bar.

We reiterate and emphasize that *no* jurisdictional defects existed in the complaint or allegations in the case at bar. We specially recognized this fact in our opinion. The defect, we pointedly observed, was that of proof. Citizens failed to ". . . present any evidence, direct or circumstantial, relative to its organizational status, structure, purpose or relationship with any person or persons. Witnesses called by Citizens did not testify relative to Citizens or their associational relationship thereto. Furthermore, no witness testified that he or she was a taxpayer of the City and County of Denver of the State of Colorado. To be sure, witnesses did testify to matters going to the merits of the First Amendment claims." (628 F.2d at p. 1298).

Thus, reliance on a long line of cases, including *Whitelock v. Leatherman, supra,* and *Buell v. Sears, supra,* decided by this Court, which recognized that jurisdictional defects *which could be cured by proper amendment of the pleadings* (technical omissions obvious in the record) should be conditionally required on remand in order to serve the interest of conservation of judicial resources, has no application here. This is so simply because there have *never been* any defects in the complaint or pleadings. The sole defect was and is the utter failure to present *any evidence* proving its jurisdictional requisite of standing.

B.

Article III of the Constitution limits federal judicial power — i.e., federal court jurisdiction — to "cases" and "controversies". The limitation has been said to serve two complementary purposes — first, it limits the business of the federal courts to "questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process" and, second, it defines the "role

assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government." *Flast v. Cohen,* 392 U.S. 83, 95 (1968).

We have previously opined that, on its face, and from the record, there is no question that the issue presented for appellate resolution — the substantial issue involving the display of the Nativity Scene under the circumstances of the record — unquestionably meets the adversarial criteria in a form capable of resolution. What we are now deeply concerned with, however, is a determination of whether the "personal-stake" requirement relating to the first purpose of the "case-or-controversy" doctrine can be "rehabilitated" in a record leading to judgment completely devoid of evidence establishing standing in the "personal stake" sense by means of a supplemental proceeding directed solely to such evidence. In terms of preservation of valuable judicial time and resources — and that of interested parties — such a proceeding has great merit. It does not, however, aid us in squarely facing the "personal stake" requirement, because, in its absence, the judgment rendered is void, not voidable.

The threshold requirement of standing in the "personal stake" concern to assure that the "concrete injury required by Article III" is satisfied throughout the action. *Sosna v. Iowa,* 419 U.S. 393 (1975). An actual "case or controversy" in the constitutional sense "must be extant at all stages of review." *Preiser v. Newkirk,* 422 U.S. 395, 401 (1975). Inasmuch, then, as the issue is one of power, the practical importance of review cannot control. *Sosna v. Iowa, supra; Richardson v. Ramirez,* 418 U.S. 24, 36 (1974). Furthermore, great public interest in the outcome of the issue in controversy cannot serve as a substitute or replacement for the necessary individual interest in the outcome. *DeFunis v. Odegaard,* 416 U.S. 312 (1974).

Mr. Justice Powell, in his dissenting opinion in *United States Parole Comm'n. v. Geraghty,* 445 U.S. 388, 409 (1980), pertinently observed, *inter alia:*

> Cases that no longer " 'touc[h[the legal relations of parties having adverse legal interests,' " are moot because "federal courts are *without power to decide questions that cannot affect the rights of litigants in the case before them.*" *North Carolina v. Rice,* 404 U.S. 244, 246 (1971) . . .
>
> ★ ★ ★
>
> . . . the rule barring litigation by those who have no interest of their own at stake is applied so rigorously that it has been termed the "one major proposition" in the law of standing to which "the federal courts have consistently adhered . . . without exception." Davis, Standing: Taxpayers and Others, 35 U. Chi. L. Rev. 601, 617 (1968). . . . We have insisted upon the personal stake requirements in mootness and standing cases because it is embedded in the case-or-controversy limitation imposed by the Constitution, "founded in concern about the proper — and properly limited — role of the courts in a democratic society." *Warth v. Seldin,* 422 U.S., at 498.
> 455 U.S. at pp. 411, 412.

C.

The Petition is hereby granted.[1] The District Court is directed to cease and desist from conducting further hearings or proceedings in this case. The judgment of the District Court of December 17, 1979, vacated by this Court for want of jurisdiction is a nullity. In vacating the judgment, it was the clear intent of this Court to dismiss the underlying complaint and action for failure to comply with fundamental jurisdictional prerequisites.

Let the Writ Issue.

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DOYLE, Circuit Judge, dissenting.

I respectfully disagree with the majority opinion.

The cause has been, it is true, ordered to be dismissed and at least part of Judge Barrett's opinion is correct for the reason that there is nothing left of the lawsuit and therefore, there is nothing to repair or add to it. No doubt this is true. That factor can be remedied easily however by an order reinstating the complaint with directions to the district court to perform such repair work and additions as are necessary so that it passes procedural scrutiny. It is fundamental that where there is a lack of jurisdiction it does not have any effect on the cause of action. No adjudication effecting the cause has been rendered. It follows, of

[1] Although the Petition requests the issuance of a writ of prohibition, we have held that "mandamus is the proper remedy to enforce compliance with a mandate." *Estate of Whitlock v. C.I.R.*, 547 F.2d at p. 510.

McKay, Circuit Judge, concurs in the result.

course, that the complaint is open to amendment and such should have been carried out.

Furthermore we must take judicial notice of the fact that the plaintiffs have now filed a new action in the distict court. That effectively results in this matter becoming moot. Hence it is unnecessary to pursue the issue of whether the complaint can be amended or not.

I am not criticising the form and content of Judge Barrett's opinion. It is well prepared and written in characteristically good style. I am merely stressing the importance of getting this matter into a posture which will allow the merits to be considered and determined. Preferably it should not become an eviction type of problem.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 79-M-1605

CITIZENS CONCERNED FOR SEPARATION OF CHURCH AND STATE,

Plaintiff,

v.

THE CITY AND COUNTY OF DENVER,

Defendant.

MEMORANDUM OPINION AND ORDER INTERPRETING MANDATE, VACATING JUDGMENT AND DIRECTING EVIDENTIARY HEARING ON JURISDICTION

MATSCH, Judge

After a full evidentiary hearing held on the plaintiff's motion for preliminary injunction and a stipulation that the case was submitted as a trial on the merits, as authorized by Rule 65(a) (2) of the Federal Rules of Civil Procedure, I entered a Memorandum Opinion and Order on December 17, 1979, directing the

entry of a judgment enjoining the City and County of Denver from the inclusion of the Nativity Scene in the Christmas display at the City and County Building in Denver, Colorado, and reserved consideration of a claim for attorney's fees and costs as a separate claim for relief. The judgment was entered on December 17, 1979, with a determination that there was no just reason for delay in entering final judgment on the claim for injunction under Rule 54(b) of the Federal Rules of Civil Procedure. Notice of Appeal was filed on December 18, 1979, and the United States Court of Appeals for the Tenth Circuit entered a stay of judgment on December 18, 1979.

Plaintiff's counsel proceeded to file a claim for costs and attorney's fees and the defendant sought a stay of that determination, pending determination of the appeal.

On September 4, 1980, the Tenth Circuit Court of Appeals filed its opinion that the appeal must be dismissed because the record did not show that jurisdiction had been established. Specifically, the appellate court said:

> We hold that this appeal must be dismissed on the ground that the party-plaintiff, appellee here, Citizens, has failed to establish on the record that any constitutionally protected interest of it or its members has been abridged by the challenged display of the Nativity Scene . . .
>
> Thus, in light of the absence of any evidence of standing, we are compelled to exercise judicial restraint in declining to speculate on the standing issue.

Because of that lack of evidence in the record, the court concluded as follows:

> In light of our holding that we are without jurisdiction over this cause on appeal, we cannot reach the merits of the dispute involving the alleged violation of the establishment clause of the First Amendment to the United States Constitution by reason of the Nativity Scene display.
>
> The appeal is dismissed and the cause is remanded to the District Court with instruction to vacate the Judgment of December 17, 1979, for want of jurisdiction.

On the same day as that opinion, September 4, 1980, the Clerk of the Tenth Circuit of Appeals entered a Judgment as follows:

> This cause came on to be heard on the record on appeal from the United States District Court for the District of Colorado, and was argued by counsel.
>
> Upon consideration thereof, it is ordered that the appeal is dismissed and the cause is remanded to the United States District Court for the District of Colorado with instructions to vacate the Judgment of December 17, 1979, for want of jurisdiction.

Also, on September 4, 1980, the Clerk of the Tenth Circuit Court of Appeals sent a letter to the Clerk of this court, enclosing a certified copy of the judgment and of the opinion with the instruction that they shall constitute the mandate under Rule 41 of the Federal Rules of Appellate Procedure. That rule directs that

the mandate shall issue twenty-one (21) days after the entry of Judgment "unless the time is shortened or enlarged by order." It is apparent, therefore, that such an order must have been entered. At any rate, the appeal has been dismissed and there are no further appeallate procedures pending.

On October 6, 1980, the plaintiff filed a Motion for Jurisdictional Hearing, requesting that this court grant a hearing limited to the issue of standing, in accordance with the decision of the Tenth Circuit, issued September 4, 1980. The defendant has filed a memorandum in oppositon to that motion, and the question of whether this court has the jurisdiction to grant the plaintiff's motion was heard on October 14, 1980. At that hearing, the plaintiff made an offer of proof, indicating that if an opportunity is provided, the plaintiff would establish that it is a voluntary association whose members are citizens and taxpayers of the City and County of Denver who are adversely affected by the City's inclusion of a religious scene in the annual lighting display at the City and County Building and that such evidence would clearly establish standing and jurisdiction for the case or controversy brought in this civil action. At the same hearing, the City was asked if it intended to construct a lighting display, including the Nativity Scene in a manner comparable with that shown in the evidentiary record of this case in December, 1980 and January, 1981. The response was that the City did, indeed, intend to construct such a display for this forthcoming holiday season, thereby repeating the controversy which came before this court in this case.

In *Coppedge v. Clinton*, 72 F.2d 531 (10th Cir. 1934) the Tenth Circuit Court of Appeals recognized that a full retrial of the merits should not be required when the issue of jurisdiction was first raised on appeal.

There, the appellate court expressly directed the trial court to hold a jurisdictional hearing on remand. That was not done in this case. However, it is most significant that while the defendant/appellant urged the Circuit Court to dismiss the action, that court in the opinion, judgment, and mandate only directed the vacation of the judgment entered in this court on December 17, 1979. Additionally, it is to be noted that the Court of Appeals made no mention of this court's action in considering the claim for plaintiff's attorney's fees as a separate claim under Rule 54(b).

The Tenth Circuit Court of Appeals noted in *Estate of Whitlock v. Commissioner of Internal Revenue,* 547 F.2d 506 (10th Cir. 1976), *cert. denied* 430 U.S. 916, in criticizing the failure of the Tax Court to comply with a mandate, that the opinion of the appellate court may be consulted to determine the intent of its mandate and that if the lower court believes the mandate to be unclear, it can make a decision reflecting its understanding of that mandate.

It is in that spirit that I now conclude that this court does have the authority to proceed in the manner requested by the plaintiff. In determining to grant the plaintiff's motion, I am acting in an acute awareness of the public interest shown in the previous proceedings in this case and the divisive effect it has had. The record of the trial shows the intensity of emotion involved, and, I can personally attest to the sharp division in public response to the memorandum opinion which I entered last December. It would seem most unfortunate if it became necessary to replicate all of that in another holiday

season, only because of an error in the assumption that the plaintiff's standing to bring this case was not contested.

Upon the finding and conclusion that this court has not been directed to dismiss that action and that it has jurisdiction to determine standing and, therefore, to determine whether a justiciable case or controversy was before this court at the time of the hearing on December 12, 1978, it is

ORDERED, that the judgment entered in this court on December 17, 1979 is vacated, and it is

FURTHER ORDERED, that plaintiff's Motion For Jurisdictional Hearing is granted and a hearing on jurisdictional is set for October 24, 1980 at 1:30 p.m.

Dated: _____

BY THE COURT:

_____

Richard P. Matsch, Judge
United States District Court

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 80-DW-1661

CITIZENS CONCERNED FOR SEPARATION OF CHURCH AND STATE,

Plaintiff,

v.

THE CITY AND COUNTY OF DENVER,

Defendant.

MEMORANDUM DECISION AND ORDER

Counsel for Plaintiff:

Jonathon B. Chase, American Civil Liberties Union Foundation of Colorado, Inc., Boulder, Colorado and Daniel H. Israel of Dechert, Price & Rhodes, Denver, Colorado

Counsel for Defendant:

Stan M. Sharoff and Darlene M. Ebert, Assistant City Attorneys, Denver, Colorado.

Filed:

This is a civil action in which Citizens Concerned for Separation of Church and State (Citizens), an unincorporated association, seeks a declaratory judgment and a preliminary and permanent injunction to enjoin the City and County of Denver (City) from displaying, storing, and appropriating public funds for a nativity scene which is part of the City and County of Denver's Annual Christmas Lighting Program. The claim arises under 42 U.S.C § 1983 and jurisdiction is based on 28 U.S.C. § 1343(3). The plaintiff asserts that the presence of the creche on the steps of the City and County building violates the Establishment Clause of the First Amendment.

A nearly identical case was filed in this court on November 28, 1979. Following a hearing on plaintiff's motion for a preliminary injunction, the matter was consolidated with a trial on the merits. Fed. R. Civ. P. 65(a) (2). Judge Richard P. Matsch ruled in favor of the plaintiff and enjoined the defendant from including the nativity scene in its Christmas lighting display. 481 F. Supp. 522 (D. Colo. 1979). On appeal, the Tenth Circuit Court of Appeals held that it was without jurisdiction to hear the case because plaintiff had failed to prove it had the requisite standing to seek relief. The appeal was dismissed and the cause remanded to the district court with instructions to vacate its judgment. 628 F.2d 1289 (10th Cir. 1980).

The present action was filed on December 2, 1980. The hearing on plaintiff's motion for a preliminary injunction was held on January 12 and 13, 1981. Unlike the earlier case, the parties did not stipulate to a consolidation with a hearing on the merits. However, they did stipulate that certain testimony and exhibits from the earlier case could be used as evidence in the pre-

sent case. Inasmuch as the background facts of this case have been adequately set out in the published opinions of the district court and court of appeals in the earlier case, only those additional facts pertaining specifically to this case will be discussed in this opinion.

In the Tenth Circuit's decision, the court pointed out that the defect in standing was not one of pleading, but rather one of proof. Plaintiff failed to

> present any evidence, direct or circumstantial, relative to its organizational status, structure, purpose or relationship to or with any person or persons. Witnesses called by Citizens did not testify relative to Citizens or their associational relationship thereto. Furthermore, no witness testified that he or she was a taxpayer of the City and County of Denver of the State of Colorado. To be sure, the witnesses did testify to matters going to the merits of the First Amendment claims.

628 F.2d at 1298.

At the hearing in this case, plaintiff called one of its members who testified that Citizens was an unincorporated association of five members, each of whom had submitted an affidavit in support of the motion for a preliminary injunction. Citizens has no charter, no bylaws, no membership dues, no treasury, no property, no formal structure, and pays no taxes. It meets whenever its members want to and had met four times in the six months prior to the hearing. The purpose of Citizens is to prevent the City and County of Denver from including a nativity scene as part of its annual lighting display at the City and County Building. At least one of its members pays property tax and one or more pay gas tax, sales tax, and occupational tax to the City and County of Denver.

Plaintiff did present evidence to show its organization and purpose. In addition, the evidence showed that members of Citizens pay taxes that go to erect, maintain, and store the City's lighting display which includes the creche. Although this evidence was not impressive, the court finds that it is sufficient to establish that plaintiff has the requisite standing to bring this case.

In approaching cases dealing with the relationship between religion and government under the First Amendment, the Supreme Court has announced a three-part test for determining whether governmental activity is permissible under the Establishment Clause:

> First the [action] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . .; finally, the [action] must not foster "an excessive government entaglement with religion."

Lemon v. Kurtzman, 402 U.S. 602, 612-613 (1971).

I. Purpose

Citizens contends that because the nativity scene is a religious symbol, its inclusion in the City's lighting display must be for a religious purpose. *See Stone v. Graham,* 101 S. Ct. 192 (1980); *Hall v. Bradshaw,* 630 F.2d 1018 (4th Cir. 1980). Defendant argues that the purposes of the nativity scene and the other elements that compose the lighting display are to promote goodwill and feelings of selflessness, to enhance Denver's national reputation, and to depict the historical origins of Christmas, a national legal holiday.

Wilbur Latham, the man responsible for the lighting display and its contents, testified that he included the

nativity scene because it was part of Christmas, just like Santa Claus and the reindeer. He stated that he attaches no religious significance to the creche and had no religious purpose for including it. Latham also testified that he placed the creche, Santa Claus, the reindeer, and Santa's workshop on the steps of the City and County Building because it was less costly and required less protective fencing.

A city council member who is also the chairman of the City's budget and finance committee described the method by which funds were appropriated for the lighting display. The city council is presented with a budget that includes thc lighting display as a part of the mayor's current events. As such, the council does not vote specifically on the lighting display or the elements that compose it. The city council member testified that it was not his intent or purpose to advance Christianity by approving the budget that included the lighting display.

Other witnesses testified to the secular purpose of including the nativity scene in the City's lighting display. A doctoral student in folklore and folklife testified that the nativity scene is a common item of American folklore. She noted that, among its contemporary uses, the nativity scene is displayed on Christmas cards and as paintings on store windows. She also testified that the use of the nativity scene is becoming increasingly secularized. A historian testified that as early as 1947 there is evidence that the nativity scene was central to the artistic plan of the City's lighting display. He stated that the inclusion of the creche in the lighting display was a Denver tradition. The historian also testified that Denver's lighting display had received favorable publicity in national magazines and had also been used on post cards.

In another nativity scene case, the Court of Appeals for the District of Columbia considered whether the inclusion of a creche in the Christmas Pageant of Peace violated the First Amendment. *Allen v. Hickel,* 424 F.2d 944 (D.C. Cir. 1970). The court noted that the government "may depict objects with spiritual content, but it may not promote or give its stamp of approval to such spiritual content." In discussing the purpose of the creche, the court reviewed the language in a pageant pamphlet that "the creche was intended to be simply one of a group of objects assembled to show how the American people celebrate the holiday season surrounding Christmas." As such, the court found its purpose no more objectionable than that of a postage stamp bearing a reproduction of a religious painting or a government-sponsored museum display illustrating various religions or holiday customs.

Similarly, in *Florey v. Sioux Falls School District,* 619 F.2d 1311 (8th Cir. 1980), *cert. denied,* 49 U.S.L.W. 3351, a public school board's rules were held not to violate the First Amendment. These rules allowed observance of holidays having both religious and secular bases through programs containing music, art, literature, and drama having religious themes and through temporary display of religious symbols associated with religious holidays. In considering the purpose of the rules, the court viewed the thrust of them to be "the advancement of the students' knowledge of society's cultural and religious heritage, as well as the provision of an opportunity for students to perform a full range of music, poetry and drama that is likely to be of interest to the students and their audience." The court explained that even if the school board desired to observe the religious basis of holidays, the Constitution did not necessarily forbid the use of materials that have a "religious basis." "Government involvement in

an activity of unquestionably religious origin does not contravene the Establishment Clause if its 'present purpose and effect' is secular." 619 F.2d at 1315.

The court finds that the present factual situation is more like *Allen* and *Florey* than *Stone v. Graham* and *Hall v. Bradshaw.* As in *Allen,* the nativity scene here was "intended to be simply one of a group of objects assembled to show how the American people celebrate the holiday season surrounding Christmas." 424 F.2d at 949. The evidence does not establish that the defendant promoted or gave its stamp of approval to the religious content of the creche. The teaching of both *Allen* and *Florey* is that a religious symbol can be used if there is a secular purpose. The purpose of a challenged display can only be discerned by considering the entire display and the context in which it is presented.

Stone and *Hall* are not to the contrary. In *Stone,* the Supreme Court struck down a Kentucky statute that required the posting of a copy of the Ten Commandments on the wall of every public classroom in the state. The court found that the statute violated the purpose part of the *Lemon* test because the Ten Commandments were not integrated into the school curriculum. The Supreme Court has more closely scrutinized claimed Establishmente Clause violations in a school setting than in a public setting. The Tenth Circuit has also recognized this when it ruled that a monolith on a courthouse grounds on which the Ten Commandments were inscribed did not violate the Establishment Clause. *Anderson v. Salt Lake City Corp.,* 475 F.2d 29 (10th Cir. 1973). In *Hall v. Bradshaw,* the court enjoined a state agency from including a "motorists prayer" on a state map that the agency published and distributed free of charge. Relying on Supreme Court prayer cases, the court stated that it

was not the business of government to compose official prayers. *But see Bogen v. Doty,* 598 F.2d 1110 (8th Cir. 1979) (upholding county board practices of having a prayer by local unpaid clergymen prior to the commencement of each board meeting). The court regards the facts in *Hall* as being much more supportive of an Establishment Clause violation than those in the instant case.

II. Effect

In determining whether the City's inclusion of a nativity scene in its lighting display has a principal or primary effect that advances or inhibits religion, the court once again must consider the nativity scene as an integral part of the City's lighting display and not in isolation. *Allen v. Morton,* 495 F.2d 65, 74 (D.C. Cir. 1973) (Tamm, J.); *Fox v. City of Los Angeles,* 22 Cal.3d 792, 587 P.2d 663, 150 Cal. Rptr. 867 (1978) (Bird, C.J., concurring). When viewed in the context of the lighting display and the Christmas season, the question for the court is "not whether there is any religious effect at all, but rather whether that effect, if present, is substantial." *Allen v. Hickel,* 424 F.2d at 949.

The nativity scene is only one of many components in the City's block-long lighting display. It is placed on the steps of the City and County Building next to Santa Claus, the reindeer and sleigh, and Santa's workshop. The figures that compose the nativity scene are of a similar size to Santa Claus and the reindeer. From a distance or at night, the creche is hardly distinguishable. This display is lit during the annual Christmas holiday season. The lights are turned off after New Year's Day and turned on again in mid-January for the ten days of the National Western Stock Show.

The court observes as did the district court in *Allen v. Morton*, 333 F. Supp. 1088 (D.D.C.1971), that Christmas is celebrated as a national holiday and the components of the City's lighting display are all related to the trarditional celebration of Christmas. The nativity scene is one of these components. As a symbol of Christmas it appears repeatedly in a secular setting. "It is seen in department stores, commercial establishments as well as in public places to symbolize the celebration of Christmas, a national holiday." *Id.* at 1093.

Citizens argues that the City's inclusion of the nativity scene is viewed as the City's endorsement of the religious content of the nativity scene. In support of this theory, Citizens called witnesses who testified that they viewed the nativity scene in front of the City and County Building as the City's endorsement of Christianity. Citizens also introduced several packets of letters and petitions to the Mayor of Denver opposing removal of the nativity scene. It is contended that the letters and petitions are persuasive evidence of the widely held public perception that the City is endorsing Christianity by including the nativity scene in its lighting display.

The City presented evidence that showed the nativity scene is a traditional symbol of Christmas that appears in many secular settings. Although the nativity scene is of religious origin, it has "acquired a significance which is no longer confined to the religious sphere of life." *Florey v. Sioux Falls School District*, 619 F.2d at 1316. Like the materials related to Christmas and other holidays in *Florey*, and as discussed by the doctoral student in folklore, the nativity scene has become integrated into our culture and heritage. When viewed in the context of the entire lighting display and the evidence presented as to the use of the nativity

scene in secular settings, the court cannot accept plaintiff's argument that because the creche is on the steps of the City and County Building, the City has given its approval to the contents of the creche.

It is the opinion of the court that little weight should be given to the letters and petitions which were admitted into evidence over the City's objection and with some reluctance by the court. They were admitted for the limited purpose of establishing that the City was on notice that various persons perceived the creche as a religious symbol. As heresay, they were not admitted to prove the truth of the matters asserted in them. Given this limited purpose, it would be improper to consider them as evidence that the authors and signatories of these writings desired the retention of the creche for religious reasons. Without having the benefit of their testimony, subject to cross-examination, the court would be speculating as to what actually motivated these persons to write or to sign the petitions. As a matter of fact, few, if any, witnesses who testified that they wanted it left in the lighting display for religious reasons or perceived that its inclusion in the display was religiously motivated.

Two psychologists called by Citizens testified that the nativity scene would have an adverse impact on children of minoritiy religions who viewed the scene. One psychologist was of the opinion that the creche would encourage prejudice against these children and also encourage them to deny their beliefs. She noted that it would also have an unfavorable impact on their self-esteem. This psychologist testified that the impact on children of minority religions would be greater if the nativity scene were on public property rather than on private property. Both psychologists based their opinions on general studies and majority-minority group literature. One of them also based her opinion on some

clinical experience. Both of these psychologists acknowledged that they were unaware of any literature or studies which specifically dealt with what effect the viewing of nativity scenes or other religious symbols might have upon children.

The psychologist called by the City refuted the testimony of plaintiff's psychologists and effectively so in the opinion of the court. He stated that there has been no research or studies that would support the theory of plaintiff's psychologists and that the studies and literature they relied on did not have application to the facts of this case. He testified that the nativity scene is question is neutral and that, in viewing it, children as well as all persons, would bring to it their own meaning. He also attached no increased significance to the viewer in seeing it on government, rather than private, property. He also testified that it would be mere speculation to give an opinion as to what the effect would be upon a viewer, including a child, unless the expert had the benefit of a study dealing with nativity scenes or at least, religious symbols.

Other of plaintiff's witnesses testified that they felt angry and fearful when viewing the City's nativity scene. Some of these witnesses stated that they also get angry with "In God We Trust" on coins and references to God in public ceremonies. Other witnesses, including theological experts, stated that the City's display of the nativity scene was blasphemous. Some testified that it cheapened what the symbol stands for. These witnesses who testified to the profanatory effect of the nativity scene underscored the secular quality of the City's lighting display. *Allen v. Morton,* 333 F. Supp. at 1093. No witness testified that he was more a Christian or less an atheist because of the City's lighting display.

Based upon the evidence presented at the hearing and the stipulated transcript of the earlier trial, the court finds that the inclusion of the nativity scene in the context of the other objects of the lighting display does not have a primary effect that advances or inhibits religion.

III. Entanglement

Citizens argues that the City's placement of the nativity scene in its lighting display creates an excessive government entanglement with religion. The Supreme Court decisions cited by Citizens in support of the entanglement test deal with governmental aid to secterian institutions, not with factual situations similar to that of the present case. In the parochial aid cases, the Supreme Court has examined four factors to determine whether government entanglement with religion is excessive: (1) the character and purposes of the institutions that are benefited, (2) the nature of the aid that the government provides, (3) the resulting relationship between the government and the religious authority, and (4) the divisive political potential of the government aid. *Lemon v. Kurtzman,* 403 U.S. 602, 615, 622-23 (1971).

Assuming these factors are applicable to the present case, there was no evidence to show that any religious institutions or groups were benefited by the City's nativity scene. No aid was given and no relationship between the City and religious institutions resulted. As to alleged political divisiveness, the court observes that in light of the secular purpose of the total display and a non-religious primary effect, no religious group or groups are being benefited and divisiveness on religious lines is not likely to be intensified.

In conclusion, a quotation from Justice Douglas is applicable. In *Zorach v. Clauson,* 343 U.S. 306 (1952), he discussed the hostility that could result in church and state relations if a common sense approach were not used.

> The First Amendment, however, does not say that in every and all respect there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise the state and religion would be aliens to each other — hostile, suspicious, and even unfriendly. Churches could not be required to pay even property taxes. Municipalities would not be permitted to render police or fire protection to religious groups. Policemen who helped parishoners into their places of worship would violate the Constitution. Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; "so help me God" in our Courtroom oaths — these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: "God save the United States and this Honorable Court."

343 U.S. at 312-13.

Fastidiousness or overzealous rigidity has never been the test, nor should it be. While government must be sensitive to the religious beliefs or disbeliefs of its

citizens, it is not required to abandon common sense. If it were determined on the evidence in this case that there was a violation of the Establishment Clause, there appears no reason why prayers in our legislative halls or "In God We Trust" on our coins would not also be unconstitutional.

Based on the foregoing, which shall constitute the findings of fact and conclusions of law,

IT IS ORDERED that plaintiff's motion for a preliminary injunction is denied.

Dated this 17th day of February, 1981.

/s/

David K. Winder
United States District Judge
District of Utah,
sitting by designation

No. 80-1857

ALEXANDER L. STEV
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

Citizens Concerned for Separation of Church and State,

Petitioner,

v.

City and County of Denver,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

REPLY BRIEF OF PETITIONER

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FOR: The American Civil Liberties Union Foundation of Colorado, Inc.

Petitioner, in its Reply Brief, wishes to correct an inexcusable misstatement of fact appearing in Respondent's Brief at page 2, n. 1, where it is stated that, "At a hearing before the trial judge on October 14, 1980, counsel for the Petitioner candidly stated that no member of the Petitioner association was even present at the trial." On the contrary, members of the Petitioner association were present throughout the trial, as counsel for Petitioner informed the trial court at the October 14, 1980, hearing. The relevant portions of the transcript of that hearing, pages 6-7, 13, are as follows:

> Mr. SHAROFF:
> ****
> The people he [Mr. Chase] called as witnesses, he knew then weren't members of the association, the plaintiff association.

So it wasn't a mere slip in

failing to ask a question to the member of the association, but a failure to even have in the courtroom those people who were members of the plaintiff organization.

THE COURT: Why didn't you raise the issue at this hearing?

MR. SHAROFF: Frankly, we didn't consider it until after the case.

THE COURT: You assumed jurisdiction just like I did?

Mr. SHAROFF: Yes, and you know, that would have saved time had we raised it, but frankly we didn't think about it until after December 17th.

****

Mr. CHASE: ...They did have the opportunity to put on whatever they wanted, and chose to waive it. That's what I find so appalling about what happened in this case is that had they not done that, had they filed the responsive pleading, had they put everybody on notice that this issue of standing was in fact at issue we wouldn't be here today. We would have put on evidence.

We had clients in the courtroom throughout the proceedings. Our clients are in the courtroom today. As a matter of fact it is not as if we held back. It is just frankly we didn't think that it was at issue, as it was not. [Emphasis added.]

Respectfully submitted,

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